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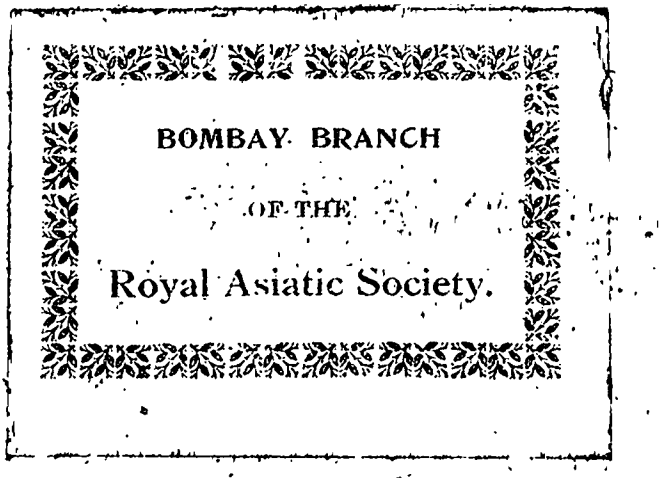

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AN INQUIRY

INTO

THE ORIGIN

OF THE

LAWS AND POLITICAL INSTITUTIONS

OF

27932

MODERN EUROPE,

PARTICULARLY OF THOSE OF ENGLAND.

BY GEORGE SPENCE, ESQ.

OF LINCOLN'S INN.

"Mirum est, ut his opusculis animus intendatur, remittaturque.

PLIN. Epist.

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TO

THE RIGHT HONOURABLE

THE EARL OF ELDON,

LORD HIGH-CHANCELLOR OF GREAT BRITAIN,

THIS WORK

IS,

WITH HIS PERMISSION,

MOST RESPECTFULLY DEDICATED.

PREFATORY INTRODUCTION.

THE author of the following work having been engaged some years since in a translation of the Code Napoleon, was induced in consequence to look attentively into the civil law of the Romans, where he found that a great proportion of the doctrines of the common law of England, even many of those which are purely artificial, were to be found in the Institutes, the Pandects, the Code, and the Novels. This induced him to study the civil and criminal code of the Romans with some minuteness, and to compare the political and judicial institutions of modern Europe, and of our own country in particular, with those of ancient Rome, in order to discover to what extent the former might be traced from the latter, their venerable and classical originals.

For this purpose the author endeavoured to ascertain what was the nature of the government, both civil and military, which was established by the Romans in the provinces of their widely extended empire, of which Britain formed a part; also to ascertain what political and civil rights were given by the laws to the inhabitants of the provinces, and what institutions existed, having for their object the preservation of such rights. He was then led to look into the history of the times, to see how the laws were administered,—a most important inquiry with reference to what may be supposed to have been the disposition of the inhabitants towards the government, under which they were living at the time of the irruption of the Germans, and the conduct of the provincials in regard to the invaders.

The next subject of inquiry in which the author engaged, was the condition of the German hordes who successfully invaded the Roman provinces, whilst inhabiting their native wilds, and the usages and laws which prevailed amongst them.

History informs us, that for several centuries previously to the general irruption of the Ger-

mans, they were continually brought in contact or communication with the Romans, either in battle or during temporary alliances. How far this circumstance might have influenced the native laws and institutions of the German hordes, naturally offered itself for investigation.

The author was next led to inquire what was the spirit with which the German hordes, or, as they are called in the histories of the times, the Barbarians, were actuated whilst prosecuting their conquests; whether they came with Saracenic zeal to sweep away existing institutions, or merely to form settlements in happier and more fertile regions; and then to endeavour to ascertain whether the same favourable disposition, which shortly afterwards evinced itself by the implicit adoption of the religious creed and ceremonial of the conquered people, was extended, and in what degree, towards their political and civil institutions.

The author then proceeded to an examination of the nature of the civil and political institutions which were established by the Barbarians in the several distinct kingdoms which were founded on the ruins of the Western Empire; more particularly

attempting to discover which of these institutions might have been adopted from, or influenced by, the pre-existing institutions. He also endeavoured to ascertain what was the condition of the conquered people after the conquest, and what rights they were permitted to retain or to enjoy. His inquiries were afterwards directed to the various changes which took place in the laws and institutions which were so established; in regard to continental Europe, down to the year 843, when the empire of Charlemagne was dismembered, and the modern empires of Germany and of France were founded; and, in regard to England, down to the establishment of the Norman dynasty, when the present constitution of England may be considered to have been founded.

The reader of the following pages will be conducted along the ground which the writer has passed over in the prosecution of these several inquiries: he must be referred to the body of the work for the result. The track which the reader will have to follow is often rugged, sometimes perhaps circuitous; but it will seldom, the author trusts, be found to be entirely devoid of interest.

The order in which the inquiries above alluded to have been prosecuted, will be seen by reference to the TABLE OF CONTENTS, where it will be observed that, in regard to the constitution of the British Parliament, the author has been tempted to go a little beyond the limits to which he has confined the other parts of the work. At the conclusion he has added a general summary, and has introduced some observations as to the rise of the laws and institutions which have been established in England since the period at which the above inquiries are closed.

An INDEX is added as supplemental to the Table of Contents.

The author has to solicit the reader's indulgence for several defects of method, and errors in language, which will be discovered in the perusal of this Essay, of the extent of which he was little aware until he was preparing the Index. Those who know how little time can be devoted to occupations of this kind, by a practising Chancery barrister, will readily understand how these defects and errors have arisen. The same circumstance must, he fears, have occasioned errors and omissions of a much more

important character. However, the interest which must necessarily attach to the subjects which are treated of in the following work, encourages him to hope that from every reader it may experience, with all its defects, somewhat of a favourable reception.

STONE BUILDINGS,
Feb. 1826.

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ERRATA ET ADDENDA.

P. 255, l. 1, *after* of, *insert* Geoffrey of Monmouth, who is followed by.
P. 430, l. 12, *for* in recompense of, *read* to allay.
P. 483, note [2], *for* imo gesto, *read* uno scuto.
P. 512, note [2], erase the reference to Matt. Paris.
P. 514, note [1], *for* stat. 24 Edw. I. *read* 25 Edw. I. st. 1. c. 5. and 6. and 34 Edw. I. de tallagio non concedendo.
P. 565, note [1], *for* remediable, *read* remedial.

Some other errors are corrected in the Index.

BOOK THE FIRST.

PART THE FIRST.

STATE OF THE ROMAN PROVINCES UNDER THE EMPERORS.

CHAPTER I.

COLONIAL POLICY OF THE ROMANS.

"Hic deinde populus quot colonias in omnes provincias misit? ubicunque vicit Romanus, habitat."—SENECA. Consolatio ad Helv. c. vii.

Early Roman colonies.

IN the early history of the Roman Republic, it was usual when a nation was subdued to distribute a considerable portion of the conquered lands in regular allotments amongst a certain number of the Roman citizens. These allotments varied in quantity according to the fertility of the soil and other fortuitous circumstances[1]; in some cases the

[1] From two acres to two and a half appears to have been the proportion originally given to each individual; thus, "Senatus censuit frequens, coloniam Lavicos deducendam; coloni ab urbe mille et quingenti missi bina jugera acceperunt A. U. C. 338." Liv. iv. 47. et v. ib. vi. 16. Afterwards as much as seven acres were given, Val. Max. iv. c. 3, 5; then ten; and in the latter years of the republic, to the amount of forty or fifty acres were given to the infantry, and twice that amount to the cavalry. See Sigonius, p. 179.

inhabitants, whose lives the conquerors considered to be by the law of nations at their disposal[1], were divided, together with the land. So long as the conquests of the Romans were confined to Italy there were always candidates sufficient to receive these allotments; and any delay in parcelling out the lands, which the Senate appears to have claimed the right to do without the interference of the people, excited considerable clamour[2].

Treatment of cities in the conquered territories.

However, this right of absolute seizure was not always exercised by the Romans. In many of the Italian states which were subjected to the Roman power, as also, in later times, in Greece and the provinces of Asia Minor, the Romans found flourishing cities, with which they no otherwise interfered than to secure their subjection, leaving to the inhabitants the enjoyment of liberty, and the possession and even ownership of a great portion of their lands. It would have been difficult, even had it been expedient, to abolish the long established usages prevalent in such cities. The citizens were accordingly, even when it had not been the subject of treaty, allowed, as far as regarded their internal polity, to retain their ancient institutions; and, in questions arising between

[1] Such seems to be the import of the digest. L. 15. 239.

[2] Vide Liv. Hist. iv. 51. "Tunc hæc ipsa indignitas angebat animos, non in retinendis modo *publicis agris* quos vi teneret pertinacem nobilitatem esse, sed *ne vacuum quidem agrum* ex hostibus captum plebi dividere."

themselves, to be governed by their own laws. Such appears to have been the condition of the cities known by the name of Municipia[1]. The condition of the cities which were denominated federate cities was very similar to that of the municipia; but, as their name seems to imply, they retained their ancient laws by express treaty. Many of these cities, both municipal and federate, retained their privileges through a long succession of the emperors[2]. To other cities governors, or presidents, were annually appointed from Rome, to administer justice and to preside over their internal affairs, with almost absolute power. Such cities were denominated Prefectures; and Camden conjectures that London was a city of this description in the time of the Romans.

Where no city or town already existed, as was mostly the case in Gaul, or where the citizens had, on the invasion of the Romans, deserted their towns, or where the inhabitants of the towns, as was sometimes the case, were reduced in mass to slavery, colonies, or cities and towns, were founded, peopled with Roman citizens. The

[1] Municipes propriè sunt cives Romani ex municipiis suo jure et legibus utentes. Coloniæ municipiis contrariæ; nam ex civitate Romana propagatæ sunt, et jura omnia populi Romani non sui arbitrii habent. Aul. Gellius, xvi. 13, and see Sigonius de Antiquo Jure Provinc.

[2] Vide inter alia Plin. Epist. x. 93. Amisenorum civitas, et libera et federata, beneficio indulgentiæ tuæ legibus suis utitur, &c.

numbers of these colonists were renewed or increased as occasion required[1]; and it was not an uncommon expedient, in order to relieve the city of Rome of a superabundance of population, especially during the pressure of scarcity, to send a number of citizens to found a colony in the provinces. When there was not a sufficient number of willing candidates, the individuals were chosen by lot, and compelled by force to proceed to the place of their destination[2].

Until the conquest of Carthage, the Romans, apparently from a desire to concentrate their strength, confined their colonies entirely to Italy[3]; but after that conquest had placed them in comparative security they extended their colonies into the East, and into Gaul and Spain, and subsequently into Britain[4].

Manner of founding colonies.

The ceremony of founding a colony was one of

[1] "Senatus consultum factum ut quoniam civitas Ardeatum redacta ad paucos esset, coloni eo præsidii causa adversus Volscos scriberentur, A. U. C. 312. Liv. Hist. iv. c. 11.

[2] Liv. Hist. ii. c. 34. Dion. Hallicarnass. iii. p. 427.

[3] Livy mentions that A. U. C. 563, "P. Cornelius consul, primo obsidibus a Boiorum gente acceptis, agri parte fere dimidia mulctavit, quo si vellet Populus R. colonias mittere possit," lib. xxxvii. c. 39; but that no colony was in fact founded out of Italy until the taking of Carthage, is expressly affirmed by Velleius Paterculus, ii. c. 15.

[4] Nine colonies were established in Britain, independently of municipal cities and prefectures, and small towns and boroughs.—Whitaker's Manchester, i. c. 3, &c.; and on this subject see Gibbon's 2d chapter.

the most solemn and imposing proceedings of the Roman people. The citizens, who were chosen by lot, or were permitted voluntarily to enrol their names, or who were appointed by the authority of the people or of the senate, during the republic, and subsequently of the emperor, to become the first settlers, proceeded with their families into the territory fixed upon for the foundation of the colony with the pomp of a military procession. Magistrates, appointed for the purpose by the senate or people during the republic, afterwards by the emperor, marked with certain solemnities the space of ground appointed for the building of the principal city and subordinate towns. At the same time the lands which the victors chose to assume were parcelled out to the new settlers; but the property or ownership in the lands so allotted, as well as those which were left to the original inhabitants, excepting such of the colonies on which the Jus Italicum was conferred, was considered as belonging to the state. The possessors had merely the use or right of enjoyment, and as a badge of subjection, and an acknowledgement of this ownership, each portion of land was made liable to the payment to the state of a certain annual tribute or census[1], the nature of which is after described.

A large portion also of the conquered land, during the republic[2], as also in the time of the

Public domain.

[1] Vinnii Comment. in Inst. Just. lib. ii. sect. 6, p. 241.

[2] Vide Liv. xlii. c. 9, &c.

emperors, was reserved for the state, and denominated the public domain. Fortresses were built when necessary on convenient parts of the public domain, to overawe the inhabitants, or to preserve the country from foreign aggression[1]; the remainder was let to farmers, who rendered a certain return in money or in corn, or other provisions.

Military colonies.

In early times the settlers were selected from the general body of the citizens. Sylla first introduced the custom of placing legions of regular troops, with their tribunes, centurions, and other officers, in colonies in the provinces; and this plan was followed by Cæsar, Pompey, and Augustus[2], in the numerous colonies which were founded by them. The succeeding emperors, as the frontiers became extended by conquest, continued to found colonies, generally composed of military, though without adhering to the plan of sending the soldiers of the same legion[3]. The extreme frontiers

[1] This appears from Tacitus, particularly his life of Agricola, Ammian, and the Augustan writers, in the history of almost every reign. See also Dion Cass. l. ii. p. 494. l. iii. p. 514. ib. 537.

[2] See Sigonius, and Rosinus Higinus, quoted by Sigonius, after speaking of the military colonies founded by Julius Cæsar, proceeds—"Æque D. Augustus, in assignata orbi terrarum pace, exercitus qui sub Antonio aut Lepido militaverant pariter et suarum legionum milites colonos fecit, alios in Italia alios in provinciis quibus deletis hostium civitatibus novas urbes constituit, quosdam in veteribus oppidis deduxit, et colonos nominavit." After the time of Sylla there were few but military colonies founded.

[3] "Non enim ut olim," says Tacitus, "universæ legiones deducebantur, cum tribunis

of all the colonies which were bounded by an enemy's country appear to have been reserved exclusively for the state.

et centurionibus et suis cujusque ordinis militibus, ut consensu et civitate Rempub. efficerent, sed ignoti inter se diversis manipulis, sine Rectore, sine affectibus mutuis, quasi ex alio genere mortalium repente in unum collecti numerus magis quam Colonia." Tac. Ann. xiv. 27.

CHAPTER II.

CONDITION OF THE CITIES, TOWNS, AND BOROUGHS[1] IN THE PROVINCES, AND OF THEIR INHABITANTS.

Councils of decurions.

ON the original foundation or peopling of every colony a certain number of the most opulent settlers was chosen[2], a preference being given to those who had children, to form the senate or council for the internal government of the colony. The scheme of civil government by senates or councils of decurions gradually extended itself, so that in the time of Constantine all the great towns in the provinces, both in the East and in the West[3], including the provinces of Britain, whether they had been founded or adopted together with their inhabitants, or re-peopled by the Romans, appear to have been subject to the same municipal regulations,

[1] *Urbs* ab urbo appellata est, urbare et aratro definire; *oppidum* ab ope dicitur, quod ejus rei causa mœnia sunt constituta. Dig. l. 16. 239. Villæ "urbana edificia," ib. l. 211.

[2] See Novell. Justin. xxxviii. ad princip. Cod. Just. x. tit. 32. and the notes of Gothofred.

[3] An important rescript in respect of the office of decurion is directed to the governor of *Britain*; Cod. Th. xi. 7. 2. A. D.

These regulations were so extremely artificial, and in many respects tyrannical, that it is difficult to conceive it possible that they should have been inforced. The decurions, or members of the council, formed a corporate body, each member being succeeded by his sons; and new decurions were added, as circumstances rendered it expedient, from the most powerful and wealthy plebeians who were possessors of landed property, twenty-five acres being considered as a qualification[1]. But it was not until about the time of Valentinian, when the burthens attendant on becoming a member of the council were more the subject of dread than the concomitant honours were of ambition, that any person who was engaged in commerce could become a member. From that time all the possessors of landed property were required to become members, to which the provincials were so extremely adverse that it became a practice for plebeians, in purchasing land, to have it conveyed to a decurion, or to some person who held some office or command that exempted him from becoming a decurion, but upon a secret trust for the benefit of the real owner[2]; thus, with the Romans as with us, conveyances and devises in trust had their origin in an attempt to avoid the provisions of the law[3]. The body of decurions was also augmented by

[1] See Cod. Theod. xii. 1. 53. ib. l. 72. ib. l. 33.

[2] See Dig. l. 1. 15.

[3] Gibbon, c. xliv. Blackstone's Comment. ii. p. 271.

the sons of veterans, who, from bodily infirmities, were unable to join the army, and who were compelled to become members of the senate of one of the cities of the province where the veteran held his lands [1].

Magistrates. In most of the cities and towns in Italy, and in many of the cities in the eastern provinces [2], one, in others two, and sometimes four chief magistrates were chosen from the body of decurions; in some cities once a year, in others every two years, in others every five years [3], and the persons so chosen were compelled under heavy penalties to undertake the office [4]. These chief magistrates or duumvirs, who were entitled to the honourable distinction of having the fasces borne before them [5], had the superintendence of the internal police of the town, and had jurisdiction in civil causes of small amount, subject however to an appeal to the governor of the province [6]. It was part of the duty of the duumvirs to entertain the citizens with shows and spectacles, and an allowance [7] from the income of

[1] See particularly Cod. Theod. xi. 1. 18. "Militarium filios qui gestandis armis idonei non esse dicuntur curiis jam jamque tradi oportet nam reipublicæ incommodum est curias hominum paucitate languescere."

[2] Cod. Theod. xi. 30. 19. et Plin. Epist. lib. x.

[3] These latter were called quinquennales or quinquennales duumviri.

[4] Cod. Theod. xii. 1. 16. a law of Constantine.

[5] Ibid. xii. 1. 74.

[6] Ibid. xi. 31. 3.

[7] Ibid. xi. 1. 29. a law of Constans. et v. xii. 1. 159.

the property belonging to the city was given to them for that purpose. It is however to be observed, that in the western provinces the office of duumvir or magistrate was by no means common [1], and that generally, throughout the West, a president, or principalis, presided over the corporation of decurions, who was nominated from the primates of that body in rotation, and who, in the Gallic provinces, was compelled to hold his office for fifteen years. The president so appointed had the general superintendence of the affairs of the city [2], but he had no jurisdiction either criminal or civil; the judicial authority which, in the cities in the Italian and eastern provinces, was exercised by the duumvirs, being given in the western provinces to the defensors, magistrates of whom I shall shortly have occasion to speak, and the appointment of whom became general in the West about the year 365 [3].

Primates.

In each of the provincial towns the names of the decurions were inscribed in order on the album of the city [4], and those who had filled any high office in the state by appointment from the emperor, and

[1] This office was exercised in many of the cities of Spain. Cod. Theod. xii. 1. 151.

[2] Cod. Theod. xii. 1. 171. Sane quoniam *principalem locum* et *gubernacula urbium* probatos administrare, ipsa magnitudo deposcit, &c. et v. l. 127.

[3] Annales de Legislation, to. i. 98, 99. a book that has been of the greatest assistance to me in arranging my materials.

[4] Cod. Theod. xii. 1. 48.

those who had been chosen to fill any offices of honour, as that of delegate from the general assembly, formed a class of themselves [1], and were denominated the primates: from this order of the decurions the principalis or president, of whom I have before spoken, was appointed. It was usual during the republic, and in the first ages of the empire, for the decurions in the provinces, in like manner as the equites at Rome, to be allowed to be the farmers of the public revenue, as a source of profit; however, the great extortions and abuses which naturally resulted from so impolitic a practice caused the emperor Theodosius to abolish this mode of enriching a favoured few of the decurions at the expense of the body of the people [2], and from his time, whatever branches of the revenue were farmed were let to the best bidder by public auction. The decurions, from similar motives of policy, were prohibited from becoming lessees of the public domains, as were the receivers-general of the public duties and taxes levied on the inhabitants of the cities [3], who were remunerated by a settled salary from the public. All the other offices of emolument in the provinces, as those of the in-

[1] See Cod. Theod. vii. 18. 13. Dig. l. tit. 3. and see Cod. Theod. ix. 35. 2. of the Decemprimi Curiales, et v. ib. xii. 19. 3. of the Primates Ordinum.

[2] Cod. Theod. xii. 1. 97. A. D. 383, and the commentary, and l. 77.

[3] As to which see Cod. Just. xi. tit. 48.

spectors, and regulators of the land tax and the like, were filled by the primates of the decurions, both with a view of affording to them some reward for their past services, as also to secure the due execution of these offices, it being supposed that persons of the rank of primates of the decurions would be above many of the temptations to which the persons exercising such offices must necessarily be exposed. From this class also the inferior citizens, who were called the plebeians [1], were at liberty to choose patrons, who, particularly before the appointment of defensors, performed the office of protectors of their persons and property, and, before that profession became venal, of advocates and counsellors.

Censors, ædiles, &c.

Besides the duumviri, or defensors and presidents [2], censors, ædiles [3], gymnasiarchi, and in some cities other subordinate officers [4], were chosen, by the decurions from their own body, to superintend the internal regulation of the city, not in rotation, but according to the wealth and merit of the individual [5]. No person regularly could be preferred,

[1] The class of equites in the provinces is very seldom mentioned.

[2] See Sigonius, p. 185; 52 et seq. Rosinus, p. 764 et seq.

[3] V. Amm. Marcell. xxviii. 6. p. 420.

[4] *Muringers*, officers who, as their name imports, have the care of the walls of the city, a most important duty in the days of the Romans, are continued to be appointed in the city of Chester down to the present day.

[5] Dig. l. 2. 7.

to the highest ranks of the magistracy without having served in the subordinate offices [1].

Originally it was the duty of the censors [2] to take care that none but persons duly qualified were admitted as members of the council, but latterly it was their business to see that those who were eligible actually became members; it also belonged to their office to keep an exact register of the names and fortunes of the inhabitants generally, that the public burthens, as well as the taxes, might be apportioned according to the means of each individual [3].

The ædiles and other officers, each in his particular department, under the superintendence of the chief magistrate or president, inspected the walls and buildings of the towns, private as well as public; for the duty of providing the soldiers with quarters gave to the state an interest in the condition of the private dwellings in the towns. These officers also regulated the markets, and generally looked to the public concerns of the town: and the ædiles had the power of destroying false weights and measures [4], and even of inflicting corporal punishment on obstinate offenders against the civil regulations of the city [5], and public scales and measures were set up in the towns under their

[1] Cod. Theod. xii. 1. 77.

[2] See Plin. Epist. x. 83.

[3] For "Civilia munera per ordinem pro modo fortunarum sustinenda sunt." Dig. x. 41. 1. and v. ib. 42. 4.

[4] Dig. xix. 2. 13. 8.

[5] Ib. l. 2. 12.

direction, according to which all contributions in kind were taken and paid [1].

To the decurions in some cities belonged the care of providing provisions, which they sold to the citizens at a fixed and just price [2]; in others, the duty of providing corn and other provisions was imposed on certain of the more wealthy plebeians in rotation, or by lot; and in some cities, as in Rome, this duty was specially appointed to a particular company.

The vote of a majority of the decurions, which was called their decree, bound the whole body; and the notaries, or public officers, in each city, whose office it was to draw up testaments, gifts, and other solemn instruments, and of whose honesty and integrity it was necessary to have good security, were not allowed to practise their profession without having the authority of a decree of the body of decurions.

Two decurions, according to ancient custom [3], were sent from the capital of each of the provinces to reside in the city of Rome; but the body of the decurions having such important duties to perform in their respective cities, and having to answer so many claims upon them by the state which required constant personal attendance, were ex-

[1] Cod. Theod. xii. 6. 19.

[2] "Non debere decuriones vilius præstare frumentum civibus suis quam annona exigit, Divi Fratres rescripserunt." Dig. L. 1. 8.

[3] Cod. Theod. xiv. 1. 3.

pressly prohibited from living in the country, even upon their own estates, or from removing from the city to which they belonged, for however short a period, without the special permission of the emperor[1] or the prætorian prefect of the diocese; and by consequence they were prohibited, without special permission, from being enrolled in the army, and also from becoming members of the church. No one who belonged to the body of decurions could be relieved from the strict and oppressive obligations to which as such he was liable, but by the emperor; and it was not until the decurion had completed the age of seventy that he was released from the duty of discharging the civic offices[2].

The decurions enjoyed some privileges; thus they were exempt from serving inferior offices, and from extraordinary burthens imposed on the citizens on pressing emergencies[3]. They had also many honorary distinctions, which, in early times, rendered the office an object of ambition, and they were generally exempt from torture and corporal punishment[4].

No decurion could sell his property except by a decree of the whole body, or by the authority of the governor, who, before he authorised such sale, was bound to ascertain that it was necessary to

[1] Cod. Theod. xii. 1. 9.—xii. 17. 1 and 2.

[2] Dig. L. 2. 2, 8.

[3] As the furnishing clothes for the army and the like. Cod. Theod. xii. 6. 31.

[4] Cod. Theod. xii. 1. 39.—Dig. L. 2. 14.

enable the decurion to fulfil his engagements or to supply his necessities [1]; and when a decurion had considerably reduced his means in sustaining the civic offices, it was open to the corporation to assign him a portion of their revenues for his support [2].

The decurions, as a corporation, independently of their possessions as individuals, owned considerable farms [3] and other property, the income of which was under their own control. Such property could not be alienated but by a decree of the majority, by which indeed, in all cases, the whole corporation was bound [4]. If the funds of the corporation were not sufficient to defray the necessary expenses of the town, the decurions might by decree impose a tax on the citizens; but this was not permitted excepting on pressing occasions: and the more regular mode was first to obtain the sanction of the emperor [5].

If a member of the corporation died without issue, or children by adoption, and intestate, the corporation succeeded to his inheritance [6]. Those who, by gift or will, derived any property from a decurion, were bound to pay a certain annual sum to the corporation to which such decurion had belonged [7].

[1] Cod. Theod. xii. 3. 1 & 2.
[2] Dig. L. 2. 8.
[3] Cod. Just. x. 32. 2.
[4] Dig. L. 1. 19.
[5] Cod. Just. iv. 61. 10.—iv. 62. 1.
[6] Cod. Theod. v. 2. 1.
[7] Cod. Theod. xii. 4. 1.

Plebeians. The citizens who were not of the rank of decurions went under the general name of plebeians; the distinction of knighthood seems scarcely to have been known in the provinces.

Slaves. Every citizen, according to his means, possessed a certain number of domestic slaves. Some gained a living by letting out slaves who were proficients in any art or mystery for hire. The condition of slaves was greatly ameliorated by the emperors; the power of the master over them, which originally was absolute, was considerably restricted by Antoninus, who affixed to the killing of a man's own slave the same punishment as the killing the slave of another. The slave who was treated with harshness or severity by his master might fly for protection to the statue of the emperor, of which there was one at least in each town; from which asylum, which it was sacrilege to violate, the judge or magistrate alone could remove him, and who might, by a merciful interference, either secure for the slave a milder treatment or cause him to be sold, the price being rendered to the master[1].

Duties and burthens to which the citizens were liable. The citizens at large were liable to various duties or burthens[2], which were of three kinds, namely, patrimonial, personal, and mixed. The *patrimonial* duties, to which, in some cities at least,

[1] Inst. Just. i. 8. 2.

[2] *Munus publicum* is thus defined in the Dig. l. 15. 239. "Munus publicum est officium privati hominis, ex quo commodum ad singulos uni-

the decurions who had not served or who were not invested with offices of honour were equally liable with the plebeians, were such as could only be performed by those who had property. Of this description were the obligation of furnishing quarters for the army (of which a more particular account is given in a succeeding page), of providing a certain quantity of provisions for distribution to the public, and of providing wild beasts for the spectacles. The *personal* burthens, to which, in general, the plebeians alone, and those who had not sufficient income to be liable to the patrimonial munera[1] appear to have been subject, and from which no plebeian was exempt excepting he had five children[2], were such as required mere manual labour or personal care; as the keeping in repair the aqueducts[3] and public works, the superintending the warming of the public baths, to which, as contributing to the health as well as the enjoyment of the citizens, the greatest attention was paid[4], and similar employments[5]. *Mixed* were such as partook of the nature of both the above descriptions of duties.

versosque cives remque eorum imperio magistratus extraordinarium pervenit;"—"et propriè quidem municipes appellantur muneris participes recepti in civitate, ut munera nobiscum facerent." Dig. L. 1. 1.

[1] Cod. Theod. xii. 17. 1.

[2] Ibid. xii. 17. 1.

[3] Ibid. xv. tit. 2.

[4] V. paratit. in Cod. Theod. xiv. 5.

[5] "Purgationes cloacarum, munitiones viarum," &c. Plin. Epist. x. 41.

Duties of the above description, to some extent in every city and town, unless when imposed upon companies, were annually allotted to certain of the citizens. In ancient times these duties were assigned to each individual, under the direction of the proconsul in his yearly progress through the province: every citizen in turn, according to his age and means [1], being liable to them, though such only could be imposed as were warranted by the ancient customs of the place; and the domicil of each citizen was marked out by the law with the same exactness as the settlement of a pauper in our days, so that it might be known what city was entitled to claim the fortune and personal exertions of each individual for performance of the civic duties. From the time of Constantine, the duty of assigning the civic duties or burthens to the individual was entrusted to certain commissioners, who, before the reign of Valentinian, are mentioned by writers under the name of Numerarii, and after his time, of Tabularii. As a security for the due and impartial execution of the office of these commissioners, they were compelled to remain in the province for two years at least after their office had expired, to answer any accusation that might be brought against them by the provincials; and to

[1] "Citra *modum sumptuum* muneribus civilibus gravari levatis aliis præses provinciæ non patiatur." Cod. Just. x. 42. 4.—x. 41. 1.

prevent any interested motives from operating upon them in the discharge of their duty, they were prohibited from making any contract of purchase or sale in the province in which they exercised their office [1]. Those who held offices of honour were not liable to have any duty of the above description imposed upon them [2]; and the personal duties, or munera, were frequently imposed exclusively on certain companies.

In the time of Theodosius there were, in almost every city and considerable town, companies of plebeians similar to those which existed at Rome, who, either voluntarily or by compulsion, exercised some particular trade or occupation for the safety, benefit, or amusement of their fellow citizens. In each of the seaports there was a particular company called the Naviculariі, whose duty it was to keep and navigate vessels for the import of provisions [3], and who, in case of the wreck of their vessels in the public service, might claim compensation for their loss. These companies were erected from time to time, as the general good of the community appeared to require, by particular ordinances of the emperor, obtained at the requisition of the proconsul [4] or governor, or at the request of a delegate sent from the

Companies or gilds.

[1] Cod. Theod. viii. 1. 6, 9, and 15.

[2] Dig. L. 4. 10.

[3] Cod. Theod. xiii. tit. 4 & 5.

[4] See Cod. Theod. xiv. tit. 4, tit. 7 and tit. 8, and lb. x. 3. 5, and the notes of Gothofred. The 42d letter of the 10th Book of Pliny's Letters, suggesting the establishment of

general assembly of the city or province. As it was found that such companies were frequently formed for treasonable purposes, the law declared that no society or company should be formed unless under the sanction of the emperor, excepting for farming the public revenue or working of mines [1].

The members of these companies, like the decurions, formed a species of corporation; they had a common chest, and a *syndic*, in whose name their concerns were transacted; and the individual members were not liable for the debts of the company [2]. Each individual of which the company was formed was confined to the city to which he belonged; and the father was replaced by his sons [3]. As to some of the companies, it was considered so important to keep up the responsibility of the members, that no member was allowed to sell or grant his landed property, excepting to a person who would engage to become a member of that company [4]; therefore persons of superior rank, who

a company of firemen, and Trajan's answer, No. 43, illustrate the manner of founding companies.

[1] Dig. iii. 4. 1. Cæsar dissolved all the companies that had not existed from of old. Sueton. J. Cæsar. c. 42.

[2] Dig. iii. 4. 7.

[3] See Cod. Theod. xiv. 7. 1 and 2. "Judices competentes dabunt operam ut ad proprias civitates qui longius abierunt retrahi jubeant cum omnibus quæ eorum erunt." Ibid. xiv. 8. 1. "Quia hæc corpora frequentiâ hominum multiplicari expediet."

[4] See Cod. Theod. xiv. 3.

could not comply with that condition, were absolutely prohibited from becoming purchasers.

The *artificers* in the several cities, but more especially in the East, of whom thirty-five different descriptions are enumerated, were exempted by Constantine from all personal duties. Painters were most particularly favoured by Valentinian, who ordained not only that they should be exempt from personal and patrimonial duties, including the receiving of guests, but that they should not have their causes tried by delegated judges [1]; and it was declared that he who infringed their privileges should be considered as guilty of sacrilege [2].

Of quartering soldiers.

The inhabitants of cities and towns, of all classes and orders, and it would appear also of the villages, were liable to have the legions or moveable armies that were sent into the provinces quartered upon them, under the direction of the governor [3].

This duty was first imposed on the provincials

3 & 13, et v. Ibid. xiii. tit. 5. 6. of the naviculariі in the eastern provinces.

[1] Pedanei judices.

[2] Cod. Theod. xiii. 4. 4. a law addressed to the lieutenant of Africa.

[3] "In qualibet vel nos ipsi urbe fuerimus, vel ii qui nobis militant commorentur, omni tam metatorum quam hospitum iniquitate summota, duas dominus propriæ domus tertia hospiti deputata,—portiones," et rel. Cod. Theod. viii. tit. 8. Cod. Just. xii. 41. 2. and the notes of Gothofred. It is to this custom that the expressions of Tacitus, Hist. iii. c. 2. "milites tantum hospitibus metuendos" refer; so in the Digest, i. 16. 4 pr. "observare autem proconsulem oportet ne in hospitiis præbendis oneret provinciam;" and as to this custom see Dion Cass.

in the year of Rome 581[1], and in the days of Cicero it had become a very serious burthen[2]. In the time of the emperors, the following regulations in regard to this burthen were prevalent throughout the empire. The mensor, or quarter-master of the army, marked on each house the name of the soldier who was to be admitted as a guest[3]; and to avoid all disputes between the guest and his landlord, the house and furniture, immediately on the entry of the guest, were each divided[4] into three equal parts; the landlord of the house chose for himself one of such portions, the guest then chose one for his own occupation, the remaining portion was left to the landlord. It was the duty of the magistrate or defensor of the city to see that this division was equitably made. The guest was forbidden to claim wood, oil, or provisions, from his host, but might receive them if gratuitously offered[5].

Every person who possessed an income from his own property sufficient to enable him to entertain,

[1] Before this time, according to Livy, "privata hospitia habebant eaque benigne comiterque colebant domusque eorum Roma hospitibus patebant;" Hist. xiii. c. 1. lvi. p. 583, &c. Hospites recipere was classed as one of the patrimonial burthens. Cod. Just. x. 41. 3.

[2] "Civitates locupletes Ciliciæ," says Cicero, "ne in hiberna milites reciperent, magnas pecunias dabant." Ad Attic. v. 21.

[3] Cod. Theod. vii. 8. 4.

[4] This custom suggests a very probable derivation of the word *quarters*.

[5] Cod. Theod. vii. 9. 1.

a guest, even the veterans, in respect of their benefices, unless specially exempted by the emperor, were liable to this burthen.

When any of the highest dignitaries of the empire were with the army, they were entitled to claim the use of one half of the house, furniture, and domestic slaves, belonging to the landlord with whom they took up their abode. In some provinces the inhabitants of towns were also bound to entertain the governors and their retinue in their progresses or circuits through the provinces.

Public works and buildings.

Every precaution was taken that the walls and defences of the cities, and the public buildings, as the forum, the mansion of the prætorian prefect, and of the governor, the temples, the public stables and granaries, and baths, and the triumphal arches and statues erected for the ornament of the cities, should be kept in good repair. It was especially required of the governor of the province to see that the several civic officers who had the care of these works performed their duty; and the governors were authorised and indeed directed to order, at the expense of the city, the erection of such new public buildings and works as they might think expedient; and, if necessary, the governor might compel the other cities in the province to contribute to the expense of such new erections. The castles on the frontiers were under the superintendence of the military commanders [1].

[1] Cod. Theod. xiv. tit. 1. et Paratitlon.

Boroughs. Besides the cities and towns surrounded by walls, there were boroughs, *burgi*, or small towns built under the protection of the forts or castles dispersed throughout the provinces, each of which appears to have been under the superintendence of their particular magistrates or officers[1]; and there were dispersed throughout the provinces villages, in which the small proprietors and cultivators, both free and in bondage, resided.

Masters, professors, and teachers. In every city and principal town, a certain number of professors and teachers of the liberal arts and sciences[2], but more especially teachers of the Latin and Greek languages, and of medicine[3], were supported at the public expense[4]. The decurions had the privilege of nominating the physicians and professors, who were to practise, and have the education of the youth, in their respective towns[5].

[1] See Cod. Theod. vii. 13. 13. Cod. Just. xi. 65. 6. Cod. The. xii. 19. 2. The word *burgus* is considered to have been derived from πυργος, which I prefer to the German derivation of Brady (on Boroughs, p. 1), the word having been in use among the Romans so long before the Germans had settled in the Roman provinces.

[2] These professors are described by the following names: Magistri Studiorum, Doctores Artium Liberalium, Professores Philosophiæ, Preceptores Grammatici latino vel græco, Rhetores vel Oratores, et Medici.

[3] Cod. Theod. xiii. 3. 17.

[4] Oratores, Grammatici, et Medici alone are mentioned in the laws which relate to Gaul. Cod. Theod. xiii. 3. 1. and the Commentary, et v. L. 11. et L. 16. At Treves a master of Latin had a higher salary than a professor of Greek.

[5] Dig. 1. 8. 9, 1. &c.

This nomination was laid before the prætorian prefect, and by him transmitted to the emperor, with such observations as he thought proper to communicate; and the professor was bound to wait for the imperial sanction, before he could practise in his vocation[1]. In order that the cities might not be too heavily burthened, the amount of the salary to be given to each professor was fixed by law.

The professors so appointed were exempt from all burthens, whether personal or patrimonial, including the duty of affording hospitality to the military and to the judges on their progresses through the provinces[2]. These immunities the emperor Constantine extended to their wives and children, that there might be no interruption to their completely devoting themselves to the instruction of their pupils, and the practice of their profession. However, they were not precluded from voluntarily undertaking any office of honour[3].

But the grand school of learning for the western provinces was at Rome; here particularly was established the academy for teaching the science of

[1] Cod. Theod. xiii. 3. 5. a law of Julian, who observes, "Magistros studiorum Doctoresque excellere oportet, moribus primum deinde facundia."

[2] Cod. Theod. xiii. 3. 16.

[3] Thus they might become duumviri, defensores, Gymnasiarchæ, ædiles, sacerdotes, flamines, or legati. Gothof. Comm. in xiii. 3. 1.

jurisprudence, to which the high-born youth of the Gauls were sent to perfect their studies. In order to be admitted to the privileges of the academy, the candidate must bring a certificate of his birth and parentage, and the recommendation of the governor of the province; and, when admitted, he was bound to conform to certain established rules, avoiding the spectacles, and every thing which had the semblance of dissoluteness of morals. The youth, on attaining the age of twenty-one years, was bound to return to his own city[1]; and the masters, whose duty it was to superintend the academies, were directed yearly to send to the emperor an account of the manner in which each scholar had conducted himself, that the prince might know who, amongst his subjects, were the most worthy to be selected to sustain the offices of honour and responsibility in the provinces[2]. A distinct college of thirty-one professors was established at Constantinople, amongst whom were two professors of law, who publicly taught in the capitol of the city[3].

Defensors of cities.

The citizens of the plebeian order, down to the reign of Constantine, had no other protection from the oppression of the rulers of the provinces than what they could derive from each citizen choosing a patron or protector from amongst the decurions; The protection of an unaccredited individual was

[1] See Cod. Theod. xiv. 9. 1. [2] Cod. Theod. xiv. 9. 3. and the Commentary.

however soon found to be unavailing; and when, by the increase of wealth, the plebeians in the western cities had grown into comparative importance, they obtained the privilege of electing within their respective cities, jointly with the decurions, a magistrate, whose duty it was to protect the interests of the citizens at large[1].

This magistrate, whose office endured for five years, and who received a salary from the revenues of the city, was called Defensor Civitatis; and, like the duumvir of the Italian cities, he had jurisdiction in civil causes of small amount, which it would have been inconvenient to delay until the holding of the court of the ordinary judge of the province. All solemn acts necessary to be done before a magistrate, such as the perfecting of gifts, the denuntiatio litis, or formal citation necessary in the institution of civil actions, whether to be tried before the defensor or the superior judges, the making of inventories of the effects of infants, and all other acts which did not admit of delay, might be done in his presence, provided the governor of the province were absent.

To the defensor also it belonged, and it was perhaps the most important part of his duty, to

[1] "Plebem tantùm vel decuriones ab omni improborum insolentiâ et temeritate tueantur." Cod. Theod. l. 11. 3. And see Novell. Majoriani, v. Gothofred, and with reason denominates this magistracy "quasi tribunatus plebis." Comment. in Cod. Theod. xiii. 3. 1.

take care that due public notice was given of the amount of the yearly taxes, imposed by the indiction of the emperor, and to superintend and see to the equitable imposition and fair collection of the taxes due from the citizens, whether in money or in kind[1]; but, lest the defensors should convert their authority to improper purposes, they were denied the power of committing any one to prison on any pretence whatever, but were bound, with all possible speed, to send any culprit brought before them, to the ordinary judge of the province[2].

Curators of the Peace.

There were also, in many of the cities, not governed by duumvirs or magistrates having criminal jurisdiction, inferior magistrates called Curators or Assertors of the Peace, who had jurisdiction to try and dispose of all trifling offences[3].

Fairs.

Some cities and towns enjoyed the privilege of holding annual fairs[4], and which could only be obtained by a grant from the emperor; and, to remove what might otherwise have been a considerable impediment to the free resort of merchants and traders to this general mart, it was ordained by Valentinian, that every person who was attending a fair should be privileged from being sued on account of any private debt or obligation[5].

[1] Vide Paratitlon in Cod. Theod. 1. tit. 11. et Comment. Ib. viii. 15. 1. et xii. 6. 23.

[2] Cod. Theod. ix. 2. 5.

[3] Cod. Theod. viii. 12. 8. ix. 2. 5.

[4] Dig. 1. tit. 11. and the notes.

[5] Ibid. and Cod. Just. iv. tit. 60.

CHAPTER III.

CONDITION OF THE COUNTRY AND ITS INHABITANTS.

By a law passed at the instance of Julius Cæsar, in the year of Rome 663, the free inhabitants of all the states of Italy who chose to accept the offer[1] were admitted to the privileges of Roman citizens, the chief of which was the living under the Roman laws. This privilege was afterwards extended by special enactments or decrees of senate, and subsequently by the edicts of the emperors to particular cities in the provinces. At length the Emperor Antoninus bestowed the privilege of citizenship on all the inhabitants of the provinces in the higher classes of society[2]; which benefit was extended by Caracalla to all the free inhabitants without exception.

Tenure of land.

A remarkable distinction continued to prevail down to the time of the destruction of the western empire, in regard to the right of property in land in Italy and in the provinces. In Italy, and in those few favoured districts on which the Jus Italicum

[1] Aul. Gell. iv. 4. Car Sigon. de Antiq. Jur. Ital. cap. 1 and 2, Vinn. Inst. p. 39, and Gibbon.

was conferred, land might be enjoyed in absolute ownership, and might be the subject of sale or transfer by mancipation, "per æs et libram," the most solemn mode of disposition in use amongst the Romans, and by which the absolute ownership of the thing sold was transferred; but in the provinces the right of property, "dominium directum," was considered as still residing in the state, and a title to the possession and enjoyment, "dominium utile," was the utmost right that a person could acquire in such lands, and this right was passed, not by mancipation, but by delivery of possession by means of a symbol on the spot [1]. As no title by prescription could be acquired, excepting to things capable of absolute ownership, no title by prescription could be set up to lands in the provinces until, by a particular imperial edict, the undisturbed possession of land in the provinces for thirty years was declared to give a right to the possession and enjoyment of such lands, by a quasi prescription. As the badge of the ownership still residing in the state, the payment of the tribute before mentioned, called the census, was exacted from the possessors of the land in the provinces, which was seized by the Romans and parcelled out to the Roman colonists; and when all the inhabitants of the provinces were declared to be Roman citizens, their possessions at the same time were de-

[1] Cod. Theod. viii. 12. l. 2. and 8.

clared to be part of the empire; and accordingly, after the edict of Caracalla before referred to, all the possessors of land in the provinces, whether such as had been left to the original inhabitants, or parcelled out to the Roman colonists, became liable to the payment of the census, or tribute of recognition of the sovereignty and ownership of the state[1].

The lands in the provinces which belonged to private individuals were divided into farms[2], varying in size according to the richness of the soil and other fortuitous circumstances; and the boundary of each farm was marked by a vacant space of five feet being left around it.

Cultivators of the soil, villeins, &c.

The principal proprietors or lords of these farms, as I have before remarked, resided in the adjoining cities and towns, where they generally held the rank of decurions; and the farms of such proprietors were cultivated entirely by *villeins* or *coloni;* but the smaller proprietors would cultivate their own farms, and reside in the villages dispersed through the country.

The *villeins*, or servile cultivators of the soil[3], were in general the descendants of the original inhabitants; but their numbers were frequently aug-

[1] See Vinn. ad Inst. p. 688. and Gibbon.

[2] Sometimes called "Sortes," v. Cod. Theod. xi. 1. 15.

[3] They are called by the several names of inquilini, adscriptitii, and villici: sometimes coloni. Cod. Just. xxxiii. 7. 18, 4. Ibid. leg. 20, &c.

mented by captives[1] taken from the German and other barbarian tribes, particularly those who, for the sake of plunder, had penetrated into the Roman dominions. The names of the villeins, and those of their families, were inscribed in the archives of the colony or district to which they belonged, and hence their name *adscriptitii*. These cultivators were in a state of absolute servitude[2], and rendered all the profits of the land to their lord. They could not acquire any property for themselves. If, however, the lord took from his slave or villein for thirty successive years a settled sum by way of rent, such person became a colonus, and was denominated a freeman[3].

Coloni. Farmers of this description, though still like the villeins attached to the soil, were free in regard to all others but their lords or patrons, against whom they could not in general, without leave from the governor, institute civil proceedings. The *colonus* owed the same reverence to his lord as was due from the freedman to his patron, and he was under some restraint in regard to the disposition of his property[4]. The accustomed rent however could neither be increased nor diminished; and, subject to such rent, and the payment of the tribute after-

[1] Many instances of this distribution of the captives are noticed by Gibbon. See particularly c. xiii. under Probus and Dioclesian.

[2] Cod. Just. xi. 47.

[3] Cod. Just. xi. 47. 5. & 18. ibid. tit. 33. 7, ib. leg. 18. § 4. ib. leg. 20. pr. and § 1 & 3.

[4] Cod. Just. xi. 49. 2.

mentioned, the colonus was owner of all his gains. Cultivators of both descriptions were, with their whole family, attached to the farm [1], which was still considered as the property of the lord; but thirty years' undisturbed absence of the colonus and his family from the farm gained for the colonus, in regard to the proprietor, absolute freedom by prescription [2].

It was only in times of danger that soldiers were permitted to be raised from the coloni [3].

[1] Si quis inquilinos sine prædiis quibus adhærent legaverit inutile est legatum. Dig. xxx. l. 112. Cod. Just. xi. 49. L. ib. tit. 47. leg. 2. 6. 7. 12. 18. 20. § 3. and 23. Dig. xxxvi. L. 112.

[2] Cod. Just. xi. 47. 22. § 1.

[3] Cod. Theod. vii. 13. 6.

CHAPTER IV.

PATRIMONIAL DOMAINS OF THE EMPEROR.

Confiscation, escheat, &c.

By the fertile expedient of confiscation, and by the legal title of escheat[1], which was the right which the law conferred upon the emperors of seizing all property to which no heirs or lawful owner appeared, and by means of donations and bequests, the emperors acquired large possessions in the provinces. The confiscation of the property of those who, from their unsuccessful attempts to maintain or seize the imperial diadem, were denominated tyrants, traitors, and rebels, and which was usually extended to all their adherents, being made in the moment of irritation, was subject to no rules; though some protection was thrown around the provincials by Constantine, who reserved the power of confiscation to the emperor himself, to the exclusion even of the pretorian prefect. Informers were entitled to claim a share in the property recovered by the crown, which caused the provincials to be continually harassed by informations that were lodged with the governors, as

[1] Cod. Theod. x. 9. 11.

to property held by individuals, alleged to have escheated to the crown. Constantine, without striking at the root of the evil, published repeated edicts for checking the rapacity of informers[1]. The emperor Constans devised the means of putting an effectual check upon informations of this nature, securing at the same time the just rights of the crown. He ordained, that when an information was lodged as to any property having escheated to the crown, the governor of the province should, by letter addressed to certain persons of credit in the province, cause an inquisition to be held before them as to the truth of the matters alleged; and in case it should appear to him, on the return of the proceedings under such inquisition, that the property in question was really without a rightful owner, or that it had in any way devolved to the crown, he was to cause the result of the inquiry to be put in writing and sent to the emperor, that he might decide upon the matter according to law[2].

[1] The language of the edicts of Constantine on this subject, which relate to informers in general, is remarkable, "Comprimatur unum maximum humanæ vitæ malum, delatorum execranda pernicies, et inter primos conatus in ipsis faucibus stranguletur, et amputata radicitus, invidiæ lingua vellatur, ita ut Judices, nec calumniam nec vocem prorsus deferentis admittant, sed qui delator extiterit (he must mean where his information proved to be unfounded) capitali sententia subjugetur:" a law addressed ad populum, A. D. 319. Cod. Theod. x. 10. 2. and see l. 3. addressed ad provinciales, and ib. l. 10.

[2] "Ut quid statuendum sit

The same rule was observed in regard to informations as to property alleged to have been conveyed by one person to another upon a secret trust, with a view to avoid the burthens and duties imposed for the benefit of the state, and which conveyances operated a forfeiture to the crown[1].

However liberal the emperors might be in distributing to the soldiers who had assisted in quelling an insurrection of rebels against the crown, or defeating the public enemy, the gold, and silver, and moveable effects, which the rebels and their adherents had forfeited, it was the general practice, at least from the time of Constans, for the emperors to reserve to themselves the houses, farms, and rustic slaves of the rebels, which were then incorporated into the patrimonial domains of the emperor[2]. Large portions of these patrimonial domains were granted out to veterans, and thus became part of the public domains, which I shall have occasion to mention in the following chapter. At present I confine myself to a description of the condition of such of the patrimonial domains as were reserved as private property, and yielded an income, in rent or produce, to the emperor.

Such of the farms in the provinces, forming part of these patrimonial domains, as were let on lease, or in the emperor's hands, were under the

per legum ordine statuemus." Cod. Theod. x. 9. leg. 11, & 13.

[1] Cod. Theod. x. 9. 20.

[2] Vid. Ibid. tit. 8. leg. 4.

superintendence of procurators or stewards, appointed by the emperors for that purpose [1]. The superintendents and tenants of these farms were exempt from the duty of providing quarters for the army, and from most of the other public burthens to which the provincials in general were subject. However the steward of a farm belonging to the patrimonial domains might consider himself distinguished by the authority and credit it gave him in the province, this ephemeral superiority was more than counterbalanced by the perilous condition in which he was placed by the law [2]; for in case it were proved that he had been guilty of extortion in the execution of his office, he was liable to be publicly burnt alive [3].

A very considerable proportion of the farms belonging to the emperor, with a sufficient number of coloni, or slaves [4], were granted by charter to private persons, to be held by them and their descendants, on condition of rendering a certain annual rent [5] or return to the imperial treasury; and for the due payment of which the person obtaining the grant was bound to give security [6]. These lands, which were denominated Emphy-

[1] Cod. Just. xi. 60. 3. and the notes of Gothofred.

[2] Cod. Just. iii. 26. 11; and see l. 8. a law of Constantine.

[3] Cod. Theod. x. 4. 1. a law of Constantine.

[4] Cod. Just. xi. tit. 62.

[5] Ibid. xi. 61. and notes of Gothofred.

[6] Ibid. xi. 61. 7.

teutici, descended like other lands to the issue of the possessor [1], and if the original grant was not restrictive, might be the subject of devise, sale, or gift [2]; the tenant, however, being always liable to pay the rent or other return due to the imperial treasury. The ownership of such lands remained in the crown [3]; however, the emperor Anastasius conceded that forty years' adverse possession, without paying any rent, should confer a title to such lands against the emperor. On failure of issue legitimate, or by adoption, unless where a power of disposition was given, such lands reverted to the emperor [4]. And in case the stipulated return were not duly rendered, the lands appear to have become forfeited [5]. The possessors of these lands, though exempt, in common with the other holders of the patrimonial lands of the emperor, from extraordinary impositions, were bound to contribute to the repair of the public ways, and similar burthens [6].

Peculiar jurisdictions.

The emperor Theodosius ordained, that no person attached to the private domain of the emperor, whether a freeman, freedman, or villein,

[1] "Sui hæredes."

[2] Cod. Just. xi. 61. 1 and 6.

[3] Dig. xxvii. 9. 3. sec. 4. "Jus εμφιτευτικον vel εμβατευτικον, jus prædii potius est quam prædii dominium." Vide post, part II. of the contract of *letting* and *hiring*.

[4] Cod. Just. xi. 61. 4.

[5] See Cod. Just. xi. 61. 2. which contains a saving in favour of infant possessors.

[6] Cod. Just. xi. 64. 1.

should be subject to the jurisdiction of the ordinary judges; and directed that the count of the domestics, or president of the bedchamber, or some person specially appointed by these great officers, should alone have jurisdiction in all matters both civil and criminal in which they were concerned[1].

[1] Cod. Just. iii. 26. 11. and the notes of Gothofred.

CHAPTER V.

THE PUBLIC DOMAIN AND ITS POSSESSORS.

FROM the earliest period, the lands on the extreme frontier, which, from their insecurity, would have been of little use to individual owners, appear to have been reserved for the state, and converted into a line of defence. This policy appears to have been universally adopted in the time of the emperors[1]. Other lands also were reserved for the state.

In the provinces which were liable to sudden irruptions, and particularly along the Rhine and Danube, the extreme frontier was, according to ancient custom, occupied by the frontier militia[2], whose peculiar duty it was to protect the borders of the empire from insult or surprise. These soldiers, who were principally selected from the sons of the veterans, were stationed in and about the numerous fortresses, lines, and defences[3],

[1] See Tac. Ann. xiii. c. 54. Dion. Cass. liv. p. 546.

[2] "Limitanei milites, Ripenses, Riparienses."

[3] Int. alia, see Dion Cassius, lib. liv. as to the fortresses built by Drusus in Germany; the life of Agricola, by Tacitus, as to the fortresses built by Agricola; and as to those built by Valentinian on the frontiers of Gaul, Amm. Marcellin. xxviii. xxix.

that were raised along the frontiers, ever ready for active service, and were commanded, from the time at least of Constantine, by generals, under the names of dukes or of counts, who were always at their head [1].

Parts of the public domain [2], and of the patrimonial domains of the emperors, were held by farmers, on the express condition of furnishing the frontier troops with provisions and other necessaries [3]: the lands so held could never become private property [4].

On the frontiers less liable to sudden irruptions, portions of the public domain were distributed in regular allotments to the frontier militia; each soldier, according to his rank, taking in lieu of pay a portion of land, provided with slaves and whatever was necessary for its cultivation [5]. In

[1] V. Vopisci Probus, c. 14, and 15; and the notes of Salmasius. Amm. Marcell. xviii. c. 11. Cod. Theod. vii. i. 9; vii. 22. 8. and the Commentary.

[2] "Agri limitrophi."

[3] Cod. Just. xii. 43. 1. A. D. 323. Ibid. tit. 36. c. 14. A. D. 400. Cod. Just. xi. 59. 1. Ib. xi. 61. 8. A. D. 385. Ib. xii. 36. 15. Ib. leg. 9. Ib. xi. 1. 21. and xii. 58. 5.; and see n. 56 of Bleterie's notes on Tac. Life of Agric.

[4] Cod. Just. xi. 61. 13.

[5] "Agros *limitaneos* universos, cum paludibus omnique jure quos ex priscâ dispositione *limitanei* milites, ab omni munere vacuos, ipsi curare pro suo compendio atque arare consueverant, et si in præsenti coluntur, ab his firmiter ac sine ullo concussionis gravamine detineri: et si ab aliis possidentur cujuslibet spatii temporis præscriptione cessante ab universis detentoribus vindicandos, iisdem militibus sine ullo prorsus (sicut antiquitus statutum est) collationis onere volumus assignari," &c. Cod. Just.

this distribution, each company or subdivision of the army, with its proper officers, appears to have been kept together. The officers continued to have similar authority over their men as when the army was embodied.

Some parts of the frontier lands of the empire were held by tribes of barbarians who had come over to the Romans, and to whom such lands had been given on condition that they and their descendants should either keep up the fortifications and lines of defence on the frontiers, or keep watch or perform other similar services for the protection of the borders [1]. One instance of this mode of colonization occurs so early as the 574th year of Rome, when a body of the Ligures, to the

xi. 59. 3. temp. Imp. Theod. et Valent. Vide ibid. xii. 36. 11. and the notes of Gothofred; and see the emperor Justinian's direction to Belisarius, for constituting, in Africa, according to the *ancient custom* of the empire, "limitaneos milites qui possent et castra et civitates limitis defendere, et terras colere;" &c. Cod. Just. 1. 27. 2. § 8.

[1] "Germanico bello 40,000 deditionum traject in Galliam Tiberius, juxtaque ripam Rheni sedibus assignatis collocavit." Sueton. Tiberius, c. ix. et v. Tac. Ann. ii. 63. "Terrarum spatia quæ *Gentilibus* propter curam munitionemque limitis atque fossati antiquorum fuerat provisione concessa, quoniam comperimus aliquos retinere, si eorum cupiditate vel desiderio retinentur circa curam fossati tuitionemque limitis studio vel labore noverint serviendum." Cod. Theod. de terris limitaneorum, L. 11. *Gentiles* were barbarians who had come over to the Romans, and are mentioned in the Theodosian Code, vii. 20. 12. &c. by the name of *Læti*, Alamanni, Sarmatæ vagi, &c.

amount of 40,000; was removed from their own habitations, and had a portion of the Roman territory assigned to them, on condition of never taking up arms but at the command of the republic [1]. The lands so held for the defence of the frontiers could never become private property; and when the descendants of the original grantees failed, they were assigned to new possessors on the same conditions [2]. Inspectors were from time to time sent into the provinces to restore possession to those who had been dispossessed of their portions, and to make new divisions of the lands which had become vacant or unoccupied [3].

Besides the lands thus occupied by soldiers, who may be considered to have been *in* active service, very large tracts of the Roman provinces were portioned to veterans who had completed their term of service, or to soldiers who had performed some signal exploits, on condition of their again serving when occasion required. Traces of this system are to be found in the early history of the republic [4]. Sylla and Cæsar, independently of the

[1] Liv. Hist. xl. 34. 38. and 53. Florus, iii. 3. Liv. Epit. lxv.

[2] "Quicunque castellorum loca, quocunque titulo possident, cedant, quia ab his tantum fas est possideri castellorum territoria quibus abscripta sunt, et de quibus judicavit *antiquitas*." Cod. Just. xi. 59. 2; and see the notes of the commentators on Ammian. Marcellinus, xiv. c. 3.

[3] Cod. Theod. xiii. 11. 9. de terris Læticis, and the commentary of Gothofred.

[4] "Et de agris militum ejus decretum ut quot quisque

military colonies founded by them, of which I have before spoken, made large grants of lands to their followers[1]. Antony, Lepidus, and Augustus each pursued the same system, with a view to attach to themselves adherents always ready to be called into action[2]. And from this time a portion of land was what each soldier looked to as the reward of his services[3].

The holders of the lands so granted out, and who themselves cultivated and resided on their farms, were liable at all times to serve when called

eorum in Hispania aut in Africa militasset, in singulos annos bina jugera acciperet, eum agrum decemviri assignarent." Liv. Hist. xxxi. 49. et vid. ibid. xxxii. 1.

[1] "Sulla Nolam in Samnio recepit 47. legiones in agros captos deduxit, et eos iis divisit." Liv. Epit. lxxx. Sueton. Jul. Cæs. c. 38, &c.

[2] Αυτος δε Augustus μεχρι Καμπανιας ελθων πληθος ανδρων εκ της Καπυης μαλιστα ατε και παρα τȣ παῖρος αυτȣ ῳ τιμωρειν ελεγε την τε χωραν και την πολιν ειληφοτων ηθροισεν· Εκ τȣτων δε δη των ανδρων και το των η ȣοκατων η ȣοκατων συστημα ȣς ανακληῖȣς αν ῖις ηλληνισας οῖι πεπαυμενοι της στρατειας επ αυτης αυθις ανεκληθησαν ονομασειεν ενομισθη. Dion. Cass. xlv. p. 276. Ibid. xlvii. p. 336-7. 358. This author, in noticing the breaking out of the disputes between the triumvirs says, εν τη κληρουχια αμφοτεροις η πλειστη δυναμεως ελπις, κ. τ. λ. xlviii. p. 360, 361. 374. And see Appian. de Bell. Civ. p. 590. quoted by Petiscus on Sueton. Aug. c. 13. and Sueton. Galba x.

[3] V. int. alia Dion Cass. xlix. p. 400. 445. The Germans under Arminius offered lands to the Roman soldiers as an inducement to them to desert, knowing, no doubt, that it was because lands had not been assigned to them as they desired, that they had lately mutinied. Tac. Ann. ii. 13.

out by the general by whom the lands had been granted during the republic, who was considered as their patron, and afterwards at the instance of the emperor[1]; and it is probable that the land reverted to the state or to the emperor on the death of the person to whom it was so granted.

In later times, portions of land, together with slaves and every thing necessary for their cultivation, were granted by the emperors to officers and soldiers, on condition that they and their descendants inheriting the land should perform military service for defence of the frontier[2].

In the time of Constantine, very large tracts of land in the provinces were held on these conditions; and by a law published by this emperor, it was declared that all vacant lands on the frontiers should be assigned to veterans. Valentinian ordained that, in addition, a sufficient number of live stock and seeds should be given to them at the expense of the public[3].

[1] "Prima belli cura," says Tacitus, speaking of Vespasian, "agere delectus revocare veteranos." Tac. Hist. ii. 82. and see Sueton. Galba, c. x. &c.

[2] Ælii Lamprid. Alex. Severus, c. lviii. Vopisci Probus, c. xvii. and see Dig. xxi. 2. 11. §. 1. Cod. Just. xi. tit. 58. xii. 48. 2, and 3. xii. 36. 17. xii. 58. 5. Cod. Theod. de filiis militar. l. 3. and the commentary. Martin, of Tours, being the son of a veteran, was compelled, in compliance with an imperial edict, to take the military oath and join the army. See his Life by Dr. Alban Butler.

[3] Cod. Theod. vii. 20. 3. and 11. Ib. vii. 20. 8. A. D. 364.

The veterans to whom lands had been so assigned were continually demanding that they should be exempt from military service[1]; a privilege which the emperors appear at length to have conceded, but only on the condition of the veteran sending one or more of his sons to the army to supply his place. In process of time the emperors claimed the right to require that all the sons of the veterans who were not members of one of the corporations in the province should, from their youth, be trained to arms, and, when of competent age, be enrolled either in the palatine troops or in the provincial or frontier militia[2].

The veterans enjoyed many valuable privileges, varying in extent under different emperors, according as their services or good-will were required. Excepting when such immunity was suspended by an ordinance of the emperor, they were exempt from the census and other public burthens; though where a veteran became the purchaser of land liable to any tribute, he was bound to pay the accustomed rent or other return[3]. The immunities originally granted to the veterans were by Constantine extended to

[1] It was one of the complaints of Percennius, that "ne dimissi quidem finem esse militiæ, sed apud vexillum retentos." Tac. Ann. i. 17. et v. Ibid. c. 36.

[2] See Cod. Theod. de filiis militar., and particularly l. 2. and l. 4. Cod. Theod. vii. 1. 8. Ib. leg. 5.—vii. 20. 12.

[3] Cod. Theod. xi. 1. 28.

their sons [1]. In judicial matters, the veterans were by the emperor Constantine placed under the peculiar jurisdiction of the prætorian præfect, and exempted from the jurisdiction of the inferior judges [2]. And the emperor Leo afterwards ordained that the generals and officers of the frontier militia and commanders of the fortresses should be subject to no judicial authority but that of the master of the offices, a dignitary of the imperial household [3].

Besides the lands so held, as it were directly from the emperor, it would appear that from the time of Constantine it was usual for the prætorian præfects to grant to the civil and military officers forming part of their retinue portions of land as well as other property, by way of stipend or reward. If such persons died without heirs and intestate, their property became again disposable by the præfect, and did not escheat to the crown [4].

The lands above referred to were portions of the Roman territory; but it may not be an improper digression here to notice, that, as a further protec-

[1] See Cod. Theod. vii. 20; particularly l. 2. 4. 8. 11 and 12. Ibid. tit. 22, l. 1 and 2. Cod. Just. xii. tit. 47.

[2] Cod. Theod. vii. 20. 5.

[3] Cod. Just. xii. 60. 8. Impp. Leo et Zeno ad Joan. Magist. Off.

[4] "Cornicularii et primi scrinii, numerarii insuper, qui in officiis tuæ sublimitatis per ordinem obsequiis militiæ desideratam laborum requiem sortiuntur," et rel. Cod. Just. xii. 53. 3: they were called Præfectarii.

tion to the frontier, and particularly on the banks of the Rhine and Danube, the Romans engaged in their service whole nations of Barbarians[1]. One hundred years before Christ the Cimbri, Teutones, and Tigurini, who came from the extreme parts of Gaul, sent an embassy to the Roman senate, praying to have a certain territory assigned to them, and promising to use their arms for the service of the republic[2]. Numerous instances are mentioned of similar embassies being sent to the emperors by wandering tribes, as the Astingi, Marcomanni, Iasyges, &c. requiring lands to be assigned to them, as Dion expresses it, επι συμμαχια[3]. The emperors most frequently found it expedient to accept of their services. Some were required to pay tribute in money or corn; but the more powerful of these nations would only consent to be treated as independent allies, and refused to be subject to any impositions. They were governed by their own chiefs and according to their own customs, excepting as far as they chose to adopt the laws and institutions of their more polished and enlightened neighbours.

Such part of the public domain as was not em-

[1] See Sueton. August. xxi. c. 2. of the Sicambri; Tac. de Mor. German. c. 29. of the Batavi and Mattiaci; of the Ubii ibid. c. 28.; and see Tac. Hist. iv. c. 17. Dion Cassius, liv. p. 546. &c.

[2] Florus, iii. c. 3. Liv. Epit. lxv.

[3] See particularly lib. lxxi.

ployed in the manner above described was let on lease to farmers, who paid a rent in produce or in money to the imperial treasury [1].

Public roads and posts.

The constant intercourse which it was expedient to keep up between the metropolis and the colonies rendered it essential that the utmost attention should be paid to keeping the public roads throughout the provinces in a perfect state of repair. Every owner of land, including the possessors of the patrimonial domains of the emperor, according to the extent of their possessions, was bound to take care that their farmers and slaves who cultivated their estates should repair the public roads at the call of the inspectors of roads, who had a regular salary from the public [2]; and the penalty of confiscation was imposed on those who endeavoured to elude this duty [3].

From reasons of state, and from a desire to remove a burthen which had become oppressive to particular districts, the Emperor Severus [4] was induced to take the keeping up of the public posts entirely into the hands of government.

In every province, at convenient distances, horses and carriages of every description were sta-

[1] As to which see Sigonius de vet. Jur. Provinc.

[2] Cod. Theod. viii. 5. 30.

[3] Ibid. xv. 3. 1, &c.

[4] Spartiani Severus.

tioned, together with mule-drivers, wheelwrights, mule-doctors [1], and other persons necessary for the establishment, and who were paid out of the public taxes, and were forbidden to take any thing beyond their salary. A certain sum by way of toll was taken from the merchants and others who were permitted to use the public conveyances, and strict regulations were enforced as to the weight of the load, the size of the waggon, and the number of mules which were to be employed. Six was the utmost number of waggons that was to be allowed to proceed from any one city in the same day [2]: no traveller was permitted to stray fifty paces out of the public road [3]. The pretorean prefect and master general of the military were charged with seeing that these regulations were duly enforced. There were *spies* appointed by the emperor at every station, who were in constant communication with the imperial court [4].

Game laws. The provincials were subject to the operation of game laws, which were most strictly enforced. No one was allowed to destroy even the most ferocious animals, as lions, tigers, or panthers, excepting in self defence; the hunting such animals being considered as a diversion in which the prince and his

[1] "Mulomedici." Cod. Th. viii. 5. 31.

[2] Cod. Theod. viii. 5. leg. 8. 17. 30 and 40.

[3] Cod. Theod. viii. 5. 25.

[4] See Cod. Theod. vi. 29. 6: and the commentary of Gothofred, as to the "Curiosi."

companions were alone entitled to indulge[1]: but ferocious animals alone were *game;* wild fowl and rabbits, and other animals of that description, might be hunted and taken by any one. The person who killed such animals, though a trespasser, gained the absolute property in them[2].

[1] Cod. Theod. xv. 11. 1. [2] Inst. Just. lib. ii.

CHAPTER VI.

MANUMISSION OF SLAVES, ETC.

Patron and freedman.

THE villeins or bond cultivators of the land, though they could not be detached from the soil, might, as we have seen, acquire their freedom, as against their masters, by prescription; they might also, like other slaves, be manumitted. A villein manumitted became a freedman[1], and from that time the relation of patron and freedman commenced, and the colonus became a species of customary tenant to the owner of the farm.

The manumittor of a slave, whether the slave were a domestic or a villein, was denominated his patron, and every patron had certain rights as regarded his freedmen. When the slave was purchased with his own money by a third person, and by him manumitted, which was one mode of obtaining freedom[2]; if he died intestate and without issue, the manumittor might claim the patron's share of his property; but the patron could not claim any part of such freedman's property against his testamentary disposition, and

[1] Cod. Theod. xi. 21. leg. unic.

[2] Cod. Just. vi. 3. 7.—vii. 4. 1.

he could not impose any services on such a freedman.

When the slave was made free by his master, even though the master received a consideration for such manumission[1], he, as a freedman, was subject to all the duties of patronage. The first duty of a freedman towards his patron was that of gratitude and reverence, the same which a parent had a right to receive from a child[2]. And, flowing from this general duty, the freedman was bound to use his utmost endeavours to advance the interests of his patron, to assist him in the management of his affairs, and the care and advancement of his family; and when necessary, to support his patron, according to his means[3]. The freedman could not give evidence against his patron[4], or proceed against him at law, without the special authority of the proconsul[5]; nor was he allowed, by himself, or through the medium of any other person, to cast any imputation on his patron's character[6]. Any neglect or breach of these duties was punished by fines, corporal punishment, banishment, or loss of freedom, according to the magnitude of the offence.

[1] Cod. Just. vi. 6. 3.

[2] Cod. Just. vi. 7. 2. Dig. xxxvii. 15. 2. and 9. xxxiv. 4. 29.

[3] Dig. xii. 6. 26, 12. xxv. 3. 5, 18, &c.

[4] Cod. Just. iv. 20. 12.

[5] Edict. Perpet. ex lib. 2. Dig. tit. 4.

[6] Dig. xxxiv. 9. 1. Of the customary *obsequium* due from the freedman to his patron or lord, see Cod. Just. vi. 6. 6 and 8. Dig. xxxvii. 15. 5 and 9. xxxviii. 1. 31.

The patron, independently of contract, was entitled to certain rights in regard to the succession of his freedman. The rights of the patron, according to the Law of the Twelve Tables, appear to have been as follows: in case the freedman died, leaving no child either born in marriage or by adoption, and intestate, the patron was entitled to the whole succession of the freedman; if, however, he left children, or the descendants of children, the patron was wholly excluded. The freedman also might leave his property away from his patron by will. It was afterwards ordained by the perpetual edict, that the freedman who had no child, either born to him or adopted, should not leave by his will more than one half of his property away from his patron; and that if he died intestate, leaving an adopted child as his representative, the patron and such representative should equally divide the succession. It was afterwards settled, that where a freedman died, leaving property to the amount of 100,000 sesterces, and one child only, the patron should have one half of his succession, the same as if he had died leaving no children; but having made a will; if there were two children, that the patron should take one-third; if more than two, that the patron should be wholly excluded, as before [1]. If, however, the patron agreed to take

[1] See the Inst. of Justin. lib. iii. tit. 8; who remarks that the law on this subject, in his time, was "nube plenum." Edict. Perpet. Dig. xxxviii. tit. 2.

money or services in lieu of his rights to the succession of his freedmen, he was bound by such agreement [1].

It was very common for the patron, at the time of manumission, to stipulate that the freedman should perform certain specified services for him, or for him and his children; if, however, it was not expressly stipulated that the services should be performed to the children, they could claim from the freedman nothing further than reverence [2]. However, the services imposed were to be reasonable, and not such as to defeat the purposes of manumission [3]. As no servile offices could be imposed on a freeman, and the son of a freedman was free, no slave could, on manumission, stipulate that his children should perform any degrading services [4]. No services could be imposed but those stipulated for at the time of manumission [5]. Services.

A freedwoman, when legally married, was, so long as the marriage continued, whether married to her patron or to a stranger, exempt from all services to her patron; but a patroness might still claim from a married freedwoman all such of the stipulated services as were consistent with the marital rights of the husband. A freedwoman could not

[1] Cod. Just. vi. 13. 2. Edict. Perpet. Dig. xxxviii. tit. 1.

[2] Dig. xxxviii. 1. 5. Cod. Just. vi. 3. 12.

[3] Dig. xxxviii. tit. 1.

[4] Dig. xxxvii. 15. 10; but see ibid. xxxiii. 2. 3. I cannot perfectly reconcile the two.

[5] Dig. xxxviii. 1. 31.

marry without the consent of her patron [1]. The male patron, or his heir, was the legal guardian of the freedman, being a minor [2]. No freedman could marry any one of the family of his patron within the degree of great-grandchild [3].

The patron had also reciprocal duties to perform towards his freedman: he was bound to protect and support his freedman when in difficulties or in need to the utmost of his power; and the patron was bound to avenge the violent death of his freedman [4]. In case the patron were the cause of any criminal proceedings being instituted against his freedman, or acted contrary to his duty towards his freedman or vassal, the bond which united them was broken, and the patron lost all the rights of patronage [5]. It may be seen from the codes, that it was usual for wealthy possessors of land to bestow on their freedmen large portions of land and other property, which reverted to the patron if the freedman were guilty of ingratitude [6].

Patron or lord and vassal.

In the latter years of the republic, and more

[1] Cod. Just. vi. tit. 3. Dig. xxxviii. tit. 1. xxvi. 1. 18.

[2] Inst. Just. i. 17.

[3] Cod. Just. v. 4. 3.

[4] "Portiones eorum fisco vindicentur qui mortem libertorum suspecto decedentium non defenderunt." Dig.

[5] Amongst the laws of the Twelve Tables was the following: "Patronus si clienti fraudem faxit, sacer esto," tab. vii. ed. Jac. Gothofred; and see Aul. Gel. xx. c. 1.

[6] Dig. xxxiii. 1. 10, 13.—Ib. xl. 14. 3, 1. Cod. Just. vii. 14. 1. Dig. xxxviii. 1. 18, 2. and l. 33. Ib. xxv. 3. 6, 1.

especially during the time of the emperors, it was customary for cities and colonies to choose some patrician for their patron, who became the protector of their interests. The inhabitants of villages, and free cultivators of the country, with a view to secure a protector from the oppressions of the governors, and other persons in authority in the provinces, very generally committed themselves, and their houses and property, by a regular instrument or charter, drawn up by a notary or tabellio, to the patronage and protection of some exprætorian prefect, or other person of high rank in the province[1]. The reciprocal duties of such client or vassal to his patron or lord, and of the lord to his vassal, would be the subject of express stipulation in the charters so drawn up, but probably varying little from the known and ordinary duties of patron and client, which were those of protection on the one side and reverence and submission on the other. Some patrons, however, and especially the more powerful, were not content with mere reverence, but required a more substantial return for their protection, namely, payment of an annual rent or other acknowledgement[2]. It seems that in Egypt the connexion of lord and vassal was perverted from the purpose of protection to a cover for the practice of fraud: the farmers, relying on the

[1] Cod. Theod. xi. tit. 24.; ibid. vii. 9. 1.

[2] See Cod. Just. xi. 54. 2.

protection of their lords, refused to render the ordinary tributes and duties due to the state, or to submit to the burthens to which they were liable; and, in consequence, before the time of Justinian, it had been prohibited that any person in that province should commit himself to another as his vassal [1]. Similar inconveniences resulting from this connexion having been experienced in the other provinces, the emperors, from Constantine downwards, published severe prohibitions against any persons in authority taking farmers under their patronage, with a view to their evading the taxes, duties, and burthens, to which such farmers were liable [2]. It is evident, however, especially from the testimony of Salvian, that the practice of humble individuals endeavouring to secure protection from oppression, by committing themselves and their property to the patronage of some powerful man, was very generally prevalent in the fifth century [3].

[1] Cod. Theod. xi. 24. l. 1, 2 and 3.

[2] Cod. Theod. i. 11. 4. p. 65. Ib. xiii. 7. 1. &c.

[3] "Tradunt se ad tuendum protegendumque majoribus, et *deditios* se divitum faciunt, et quasi in jus eorum ditionem transcendunt. Nec tamen grave hoc esse aut indignum arbitrarer, imo potius gratularer hanc potentum magnitudinem quibus se pauperes dedunt, si patrocinia ista non venderent—omnes enim hi qui defendi videntur defensoribus suis *omnem fere substantiam* prius quam defendantur *addicunt*." Salvian de Gub. Dei, lib. v. Ducange voce Salvamentum; for which reference I am indebted to Mr. Hallam. Et V. Cod. Theod. vii. 9. 1.; a law addressed by Constant. and Honor. *ad Provinciales*.

CHAPTER VII.

ASSEMBLIES OF THE PROVINCIALS.

In each of the cities and towns[1] in the provinces, there was held at stated periods, commonly once a year[2], an assembly or concilium, for the discussion of matters which concerned the welfare of the citizens at large. At all times, when the provincials required relief from any pressing evil, and more especially from the burthen of taxation[3], the reform of any existing abuse, or the adoption of any measure for the public benefit, the decurions where the matter con-

[1] Cod. Theod. xii. 12. 16.

[2] "Tripolitani, adlapso legitimo die concilii, quod *apud eos* est annuum, Severum et Flavianum creavere *legatos*. Venerunt in comitatum (principis, sc.) legati, aditoque principe, — obtulerunt decreta *textum continentia rei totius*. Quibus lectis," &c. Amm. Marcellin. xxviii. cap. 6. p. 419.

"Ad *provinciale concilium* in una frequentiore totius provinciæ urbe, cunctos volumus convenire, qui primatum honorantur insignibus," et rel. xii. 12. 12. Cod. Just. eod. tit. l. 5. "Inde quod in consilium communia vota deducunt, vel in æde publica, vel in aliqua fori parte tractetur, ad quam omnium possit esse concursus, ne quid dispositio paucorum regat," &c. et v. Ib. l. 13. addressed ad P. F. P. per Illyricum, A. D. 392.

[3] V. l. 3. Cod. Theod. de *Censitoribus*.

cerned only an individual city, and the principal inhabitants where the matter related to the province or diocese at large, were permitted, or rather encouraged, to hold an extraordinary council [1] to debate and decide upon a petition to be presented to the emperor, and to choose one or more delegates [2] to convey such petition to the emperor. The prætorian præfects and their lieutenants, and the governors of the provinces and magistrates of the cities, were expressly prohibited from impeding the holding of such assemblies, or interfering with their proceedings [3].

Mode of voting and presenting petitions to the emperor.

When the petition originated with a city or town, it was debated and decided upon by the decurions assembled in council in the town-hall or in the forum. All the members of the corporation who were not prevented by disease or accident were compelled to attend [4]. If it were a diocese [5] or a province that desired the interference of the emperor, the council [6], which in such case was convened by the prætorian præfect, at the requisition of the principal inhabitants, was held in the town-hall or in the

[1] "Solemne concilium."

[2] Or *speakers*, Cod. Theod. xi. 1. 34. where Valentinian adds at the end of his edict, "Quæ pietatem nostram viri spectabilis Bubuli comitis et *legati* decernere coegit *eloquium*."

[3] Cod. Theod. xii. 12. l. 8, 9, 12. "Nullus igitur obstat cœtibus dictator, nemo consiliis obloquatur."

[4] Cod. Theod. xii. 12. 15. inserted in Cod. Just. x. 63. 6. as applicable only to Alexandria.

[5] Cod. Th. xii. 12. 9.

[6] Then called, "Provinciale Concilium," Cod. Th. xii. 12. 7 and 12.

forum of the metropolis or principal city of the diocese or province. In order that the members might be reminded that it was for the general good that they were met to deliberate, free access was afforded to all the citizens to witness the proceedings, though none but the members summoned to the council could join in the debate [1].

The primates of the decurions of each city and town were alone summoned to the provincial councils. If there were any person resident in the province who had been honoured with the dignity of prætorian præfect, it was necessary before the council were held that a deputation should wait upon such dignitary at his house, and explain to him the nature of the proposed petition, and he was permitted to appoint a *proxy* to attend and vote at the council [2]. The members of the assembly being met, the intended measure was proposed and debated. If it were decided that a representation should be made to the emperor, a decree [3] or petition, incorporating a statement of the facts, and the result of the deliberations as decided upon by the majority of votes, was drawn up in writing and signed by all the members present. The delegate was then chosen; or if more than one was thought necessary, two, or

[1] See Cod. Theod. xii. 12. 12. Cod. Just. eod. tit. l. 5. A law addressed to the præt. præf. of Illyricum; and Cod. Theod. eod. tit. l. 13. A law of the year 392, addressed to the same præt. præf.

[2] Cod. Theod. xii. 12. 13.

[3] *Decretum*. Ibid. xii. 12. 10.

sometimes three, were appointed; and in a council held for a diocese, each province, if that were preferred, might send a distinct delegate [1]. It was the duty of the delegates first to lay the petition before the prætorian præfect. It would appear that, down to the time of Valentinian, the prætorian præfect was at liberty himself to determine upon the matter of the petition, or remit it to the consideration of the emperor. This discretion was originally vested in the prefect, to protect the emperor from being troubled with matters which did not require his special interference: but the prætorian præfects having grossly abused this authority, it was ordained first by Valentinian, and subsequently by Theodosius, that the petition should merely be *discussed* in the auditory of the prætorian præfect [2]. This auditory consisted of the lieutenants and companions of the prefect, and the governors of the provinces over which he presided. It was also ordained by the last named emperors, that the petition should be transcribed in the archives of the office of the prætorian præfect, instead of being entered as formerly in the records of the governor of the province [3].

The petition having been discussed in the auditory of the prætorian præfect, was returned to the delegates, together with the result of the discussion, in order that the whole might be pre-

[1] Cod. Theod. xii. 12. 9.
[2] Ibid. xii. 12. 10.
[3] V. Ibid. xii. 12. 3 and 4; and ib. l. 10 and l. 14.

sented to the emperor. To facilitate the progress of the delegates, they were allowed the use of the public carriages and posts, and they were provided by the city, or province, or diocese from which they were sent, with ample funds to defray their expenses. The delegates sent from the provinces were generally of *respectable* rank; those from the towns were always decurions.

The petition having been presented to the imperial quæstor or chancellor, was by him laid before the emperor. The petition was then discussed in the imperial consistory, which was composed of the great officers of state; and the delegates were sometimes allowed to advocate[1] the measure in the presence of the emperor. The edict or decision was pronounced by the emperor; and having been reduced into writing by the quæstor, was transmitted to the province or city by the hands of the delegates; and the edict was there promulgated as a law of the empire[2].

It was at these assemblies also that the ceremony of voting the *aurum coronarium*, or present of gold, was gone through. This was an *offering or benevolence*, claimed from the provincials, on the announcement of any victory

[1] See Cod. Theod. xi. 1. 34.

[2] See preceding references, and ib. xii. 12. 10, and the references in the Paratitlon and the Commentary. I have thought it not inapposite to set out the formal parts of an act of parliament originating with the *Commons* of England in the Appendix.

gained by the emperor, the birth of a son, or other event which was supposed to be the subject of general rejoicing: it was transmitted to the emperor by the hands of a delegate chosen for the purpose[1]. The opportunity of transmitting this *benevolence* would, no doubt, be frequently seized by the provincials to present by their delegate a petition for relief from the burthen of taxation, or the reform of abuses.

[1] Cod. Theod. xii. 12. 15.

CHAPTER VIII.

CIVIL AND MILITARY GOVERNMENT OF THE PROVINCES.

"The ponderous volumes of the codes and pandects would furnish ample materials for a minute inquiry into the system of provincial government, as in the space of six centuries it was improved by the wisdom of the Roman statesmen and lawyers."—GIBBON, c. xvii.

Government of the provinces prior to the time of Constantine.

AUGUSTUS affected to preserve the ancient forms of the republic; and under his reign, and those of his successors down to the reign of Constantine, the provinces continued to be governed nearly according to the same forms as had been in use during the republic. From the reign of Severus[1] indeed the governors were under the superintendence, at first of two, then of four prætorian præfects, who, each in their respective departments of the empire, had supreme jurisdiction and authority, and the powers of the governors were abridged and modified in some particulars by the succeeding emperors; but until the final separation of the civil from the military authority, which took place under the reign of Constantine, the

[1] Herodian. Hist. lib. iii.

governors may be considered as the successors of the ancient proconsuls and proprætors.

The supreme authority, both civil and military, down to the period I have mentioned, was generally committed to the same person. In the peaceful provinces of the East, which, in the division of the empire between the emperor and the senate, were reserved for the senate, the governor was selected from those who had filled the high office of consul, and with the outward honour he retained the ancient title of proconsul [1]; but though he was considered as receiving his civil authority from the senate, he derived his military command from the appointment of the emperor, who had the entire regulation of the army. The provinces of the West were governed by military lieutenants of the emperor, who, under the title of presidents, had all the prerogatives, civil and military, though not all the outward emblems of dignity of the ancient proconsuls, and who were appointed during the pleasure of the emperor [2].

According to the scheme of government which prevailed during the republic, and in the first ages of the empire, before the proconsul or president departed from Rome for the province committed to his charge, there were chosen from amongst the senatorian order, according to ancient custom, cer-

[1] See the Digest. de Offic. Proconsulis.

[2] Sueton. August. xlvii. Dion. Cass. liii. p. 503.

tain persons distinguished as military commanders, and others eminent as jurisconsults, to be the companions (*comites*) and advisers of the governor, and to share with him as lieutenants [1] the duties of his office when he should require their assistance. The number of the lieutenants depended upon the rank of the governor and the extent of the province. Each governor also took with him a number of the young nobility or sons of the senators as "contubernales," to initiate them into the science of government, and to instruct them in the art of military command [2].

The governor was attended by a numerous and splendid retinue of military officers, and also of civil dependants, as registrars, notaries, summoners, augurs, heralds, chamberlains, and physicians, and by lictors, varying in number from six to twelve, according to his rank [3]. He was furnished with slaves skilled in various arts, horses, mules, robes

[1] "*Legatos* Romani appellant quos provinciarum rectoribus addunt ut iis subsidio sint." Appian. de Bell. Civil. lib. i. Varro describes them as "Publice lecti, quorum opera consilioque uterentur peregre magistratus."—The following passage is from Sallust: "Metellus propere cunctos senatorii ordinis accersiri jubet,—eorumque atque aliorum quos idoneos ducebat *consilium* habet, ita *more majorum* ex consilii decreto per legatos, Jugurthæ imperat," &c. Bell. Jugurth. lxvi. p. 221. Havercamp.

[2] Cæsar, when dictator, ordained, "Ne quis senatoris filius nisi contubernalis aut *comes* magistratus peregre proficisceretur." Sueton. Cesar.

[3] Sigonius de Antiq. Jur. Provinc. cap. de Presidibus.

of state, and other things which were considered requisite to enable him to fulfil the duties and sustain the dignity of his office, and he was provided with a salary from the public treasury [1]. The mules, horses, and slaves he was bound to return on relinquishing his office; the other things he was allowed to keep, unless he were guilty of maladministration, in which case he was bound to make a four-fold restitution of all that he had received.

The governor, or, if he were prevented by any cause, a lieutenant [2] deputed by him for the purpose, was accustomed to make a progress through the several cities and principal towns in the provinces, once at least in every year, for the purpose of holding his court [3], and for the administration of justice to the provincials, particularly the Romans, and for despatching the public business of the province. Notice was previously given by public proclamation, of the time and place of holding this court or general assembly of the district [4]. And all persons who were liable to act

[1] Ælii Lamprid. Alex. Severus, c. 42. Severus was so attentive to the comforts of the governors, as to provide "Si uxores non haberent singulas concubinas accipiant, quod sine his esse non possent." Lamprid. ubi supra.

[2] See Cicero ad Att. v. 21, &c. but "Legati proconsulis nihil proprium habent nisi a proconsule iis fuerit mandata Jurisdictio." Dig. de Offic. Procons.

[3] Conventus.

[4] Thus Livy mentions, that

as criminal or civil judges, or civil assessors, or who were bound in any way to assist in the business of the court, which included the principal inhabitants of the province, were required to attend accordingly. So long as the civil and military authorities were united, these sessions were usually held at the time that the army was in winter quarters [1]. In criminal proceedings, though a lieutenant might try a criminal, the proconsul himself could alone pass sentence on the culprit.

The system so established subsisted with little variation down to the time of Dioclesian; but when the empire, according to the plan of government instituted by that emperor, was governed by four princes, each had his prætorian prefect, who exercised the supreme authority both civil and military over the governors of the provinces within the dominions of his sovereign [2]. When the empire again became united under one sovereign, in the person of Constantine, he continued to appoint the same number of prætorian prefects, and committed to their respective care the same

"Siculorum civitatibus Syracusas aut Messanam a Lilybæum indicitur consilium a Prætore Romano, *conventus* igitur eo imperio evocati conveniunt," &c. And Cicero "Laodiccam pridie kal. sext. venimus, ibi morati triduum perillustres fuimus, dein Apamiæ quinque dies, Synnadis triduum Philomeli quinque dies, Ionii decem fuimus, nihil eâ jurisdictione equabilius." Epist. ad Att. v. 20; and see Plin. Epist. x. 42. 66.

[1] Cicero ad Attic. v. 14. p. 231.

[2] Gibbon, c. xvii.

districts. But this emperor effected a most important revolution, in finally separating the military from the civil authority of the governors.

Scheme of military government under Constantine and his successors.

Under the scheme of government established by the emperor Constantine [1], the supreme military authority in the provinces was exercised by the master-general of the cavalry and of the infantry, each of whom presided over a certain number of provinces. The moveable legions and palatine troops were raised and recruited by way of conscription; and it was in the power of the emperor, as occasion required, to impose the raising of a certain number of men upon each district in the empire. Each possessor of land, from the senator down to the plebeian, was bound, on the issuing of the imperial mandate, if an extensive landowner, to find a certain number of soldiers; or, if of small estate, to contribute, with one or more of the neighbouring proprietors, in the providing of a soldier. Sometimes indeed a certain sum was required to be paid in lieu of men. In the time of Arcadius, an option was given to the landed proprietors of senatorian rank, of paying twenty-five solidi instead of each soldier that they were bound to raise. Even the holders of the patrimonial domains were not excused from the con-

[1] See Gibbon, ubi supra.

scription[1]. The palatine troops were under the immediate orders of the masters-general, but the stationary armies, or frontier militia, were commanded by generals denominated *duces* and *comites*, who were subordinate however to the masters-general. The use of arms was expressly forbidden by Valentinian to all persons who were not enrolled in the palatine or provincial armies[2].

The supreme civil authority, according to the system established by the emperor Constantine, was still committed to four prætorian prefects. One presided over the provinces of the East; another over Italy, Rhætia as far as the banks of the Danube, and the Roman dominions in Africa; a third over Illyricum, which included Pannonia, Dacia, Macedonia, and Greece; and a fourth over the Gauls, which included Spain and Britain. Each of these extensive governments was divided into dioceses of convenient extent, consisting of a certain number of provinces. In that diocese, which comprised the capital, or metropolitan city, the prætorian prefect himself held his court. Each of the other dioceses was governed by a vice-prefect, appointed by the emperor, who had similar authority to that which was exercised by the prætorian prefect[3], subject however to the control of

Scheme of civil government under Constantine and his successors.

Prætorian prefects and vice-prefects.

[1] Cod. Theod. vii. 13. l. 7. 12 and 13.; and see Gibbon, c. xvii. vol. iii. p. 65.

[2] Cod. Theod. xv. 15. 1.

[3] Cod. Theod. i. 5. vi. 6. 7.

that great dignitary by way of appeal. The prætorian prefect, and the vice-prefects [1], each in his own diocese, held at regular intervals a court for the determination of appeals from the decisions of the governors of the provinces; and it was their duty to superintend the conduct of all persons in authority within the province, and more especially to watch over the collectors and all other officers connected with the revenue [2].

Governors or presidents of provinces.

Each of the provinces of the empire [3], being 116 in number, was, according to the scheme of Constantine, committed to the superintendence of a governor, appointed by the emperor during pleasure. The governor received a fixed salary from the public [4]; and, under the title of proconsul—which however was still confined to the governors of the eastern provinces—or of consular, president, moderator, or corrector [5], exercised a civil authority similar to that of the ancient proconsuls; lessened however of some of its prerogatives, such as the right of imposing taxes and of confiscating the property of the provincials [6], which were reserved, with some exceptions, to the emperor alone.

A certain number of secretaries, registrars, ushers, and other officers necessary for expediting

[1] See Cod. Theod. x. 15. 4. Ibid. i. tit. 6.

[2] Ibid. i. 6. 1. et comment.

[3] Britain was divided into distinct provinces.

[4] Cod. Theod. i. 10. 3.

[5] Cod. Theod. viii. 4. 8.—Ibid. xi. 34. 2. et commen.

[6] Ibid. ix. 4. 1.

the judicial business, were attached to the court of each prætorian prefect, vice-prefect, and governor. The principal of these officers were appointed by the decurions of the chief towns in the province; but as they were liable to be put to the torture, at the instance of any one who brought an accusation against the governor, for malversation in the exercise of his duties [1], it is matter of surprise that any one could be found to undertake the office, more especially as the provincials were invited by the emperors to bring forward such accusations [2]. No person could exercise the office of governor or judge in his native province; and in order that the officers attached to the court of the governor, who were in fact the spies upon his actions, might not be influenced by the ties of gratitude or affection, their salaries were paid by the public [3]; and the governors were prohibited from bringing such officers with them into the provinces, or having any voice in their appointment [4].

The governors were required always to be accessible, and for this purpose to reside in the palace or mansion which was provided by the public for their residence [5]. Not only the governors, but all officers connected with the administration of

[1] "Ad deteganda judicis flagitia." Cod. Theod. i. 12. 3.

[2] Cod. Theod. ix. 1. 4.

[3] Gothof. commen. in Cod. Theod. i. 12. l. 2.

[4] Gothof. commen. in Cod. Theod. i. 12. 3.

[5] Ibid. i. 7. 4. et commen. "non diverticula deliciosa sectetur—judex."

justice, were prohibited from purchasing any property in the province in which they exercised their functions, and from entering into any civil contract, even that of marriage; nor was the judge allowed to sacrifice his dignity or distract his attention from his duties by becoming engaged in any mercantile concerns [1]. As on the one hand the governor was prohibited from endeavouring to acquire a dangerous popularity, by too frequent or lavish an expenditure in public exhibitions, he was on the other hand invited, and indeed required, to conciliate and divert the people under his government by the exhibition of games and entertainments [2].

[1] Ibid. viii. 15. 1. &c.

[2] Cod. Theod. xv. tit. 5. tit. 6. 1. tit. 9. 2. "cunctos judices admonimus ut ludorum quidem quibus moris sit intersint, festivitate et oblectamentis favorem eliciant populorum."

CHAPTER IX.

THE PUBLIC REVENUE.

"The first twenty-eight titles of the eleventh book of the Theodosian Code are filled with circumstantial regulations on the important subject of tributes; but they suppose a clearer knowledge of fundamental principles than it is at present in our power to possess."—GIBBON, c. xvii.

Revenue of the provinces.

THE revenue collected from the provincials, down to the time of Constantine, arose from three general sources, namely—duties, tributes, and taxes.

Duties.

The duties, *vectigalia*[1], were chiefly levied on the inhabitants of cities and towns, and consisted of certain fixed sums, which were payable to the state. Thus there were duties payable on the import and export of merchandize, and on sales, and hirings, and other contracts, which appear to have been collected by the notary who drew up the verbal process of the act. Of this nature also were the tolls collected at the bridges over the

[1] "Publica vectigalia intelligere debemus ex quibus vectigal fiscus capit, quale ut vectigal portus, vel venalium rerum, item salinarum, et metallorum, et picariarum." Dig. L. 16. 17., et v. Plin. Epist. x. 109. "Pecuniæ quæ ex locationibus," &c.

great rivers, and on the public ways; for though a part of the money so raised was applied to the sustentation of the bridges and repairs of the highways, a very large proportion was applied to the service of the state [1]. A certain proportion of every legacy was due to the public treasury; there was also due to the treasury a certain fixed proportion of the value of all metals and minerals dug from the earth [2].

Census, or general tribute.

From the farms in the country belonging in ownership to private persons, a general tribute [3], called the *census*, was due to the public treasury [4], and which no private stipulation could vary [5]. This tribute appears to have been charged and exacted in three different ways, according to the custom which prevailed in the district. The first mode was by way of capitation, that is, a certain sum was paid for each cultivator, which the cultivator himself, who was called *tributarius*, was bound to pay in the first instance to the collector of the imperial exchequer. By the second method, a certain portion of the *rent* was exacted from the proprietor. According to the third method, the

[1] See Dig. xliii. 12. 3 & 4.

[2] Dig. iv. 16. 17. From Cod. Theod. x. 19. 10. this proportion appears to have been one-tenth.

[3] "*Tributum* erat pecunia populo imperata, quæ tributim a singulis pro portione census exigebatur. *Vectigal* ea pecunia, quæ alio quocumque nomine exigebatur." Varro.

[4] Cod. Just. xi. 57. 4. Cod. Theod. xiii. tit. 10 and 11.

[5] Cod. Theod. ii. 1. 2.

proprietors of the land in the district were bound to pay a certain proportion of the annual *value* of the land [1]. In some districts it would appear that the tribute was levied according to a method compounded of all the three modes above described. This tribute was in some countries rendered in money, in others in produce of the land [2]; in *Britain* it was chiefly rendered in corn. The cultivators were attached to the soil, and forbidden to be inrolled in the army, principally in order that this tribute might not fall off by the lands becoming waste and uncultivated [3]. When this tribute was levied according to the third of the methods above described, namely, by the exaction of a part of the annual value, the amount to be paid by each possessor was fixed by regular assessments, which were made at stated intervals by censors chosen from the primates of the decurions. These censors were required previously to call before them the possessors of the land, and to inquire from them the nature of the soil, the value of their stock, and the amount of the income derived from their lands. In order that the value might be accurately ascertained, a list and description even of the trees and plants on the land was inscribed in the books of the censor [4]. In every

[1] Cod. Just. xi. 47. 20. Ib. tit. 51.

[2] Cod. Just. xi. 47. 5.

[3] Cod. Just. xi. 47. 7. leg. 23. § 2. et seq. Ibid. xi. 34. 5. Ib. tit. 62. 4.

[4] Cod. Theod. xiv. 11. 1, and the Commentary.

city a register of the amount or proportion of this tribute, payable from each portion of land throughout the district, and of the names of the persons liable to it, was kept by the censor, and corrected from time to time. In parts of Gaul it was required of every purchaser, before he took possession of any land purchased, first to have his name inserted in the censor's books, and to give security for the due payment of the tribute assessed on the land so purchased [1]. When by reason of a hostile incursion, or from any other cause, the land became waste, so that the accustomed amount of tribute could not be raised from any particular portion of land, on complaint being made to the governor or prætorian præfect a new census was ordered to be made [2]. Sometimes also, at the request of the provincials, inspectors [3] were appointed by the prætorian præfect, whose duty it was so to apportion the census, or tribute, that all the lands of the provinces might bear their just proportion according to their value. If the tribute so payable were left in arrear beyond a limited time, the land might be sold by the governor of the province [4].

[1] Cod. Theod. xi. 3. 5.

[2] See Cod. Just. xi. tit. 57. "Omne territorium censeatur quotiens defectorum levamen exposcitur, ut sterilia et erema his quæ culta et opima sunt compensentur;" et v. ib. 64, a rescript of Theodosius.

[3] Peræquatores. Cod. Th. xiii. tit. 11.

[4] Dig. xix. 1. 52. and Gothofred's notes, and Cod. Th. de annon. et tribut.

The ancient custom of letting to farm certain of the above branches of revenue, was continued under the emperors; it was directed that such lettings should be made by public auction to the highest bidder, and for a term not exceeding three years, the taker was bound to find security [1].

Taxes.

The duties and tributes above described were fixed and settled, and were due as of common right; but the proconsul under the ancient system had the power, if he saw occasion, and was bound when he received a command to that effect from the emperor, to levy *taxes* or impose extraordinary burthens on the inhabitants of the province who were not exempt from such burthens [2], taking care to apportion the amount imposed on each individual according to the extent of his property [3].

The occasion of levying such taxes was usually the necessity of equipping an army or a fleet, and the provincials were sometimes enjoined themselves to provide, in specie, the stores, provisions, and equipments, or the vessels of war that were required.

Indiction, or tax on land.

However, from the time of Constantine [4], the

[1] Cod. Theod. iv. 12. 1.

[2] These taxes are denominated *temeraria* by Festus; in the Theod. Code, xii. 1. 173. they are called "Descriptiones."

[3] Cod. Just. x. 41. 10.

[4] V. Paratit. in Cod. Th. xi. tit 1.

privilege or duty of imposing taxes was taken away from the governors of the provinces, and reserved to the emperor himself. The ordinary tributes and duties continued to be payable, as before; but instead of the ancient mode of levying *extraordinary taxes*, the following system was established. The emperor having by the advice of the *count of the sacred largesses*, or chancellor of the public exchequer, estimated the current expenses of the year, signed a formal taxation or *indiction*, specifying the amount to be paid by the possessors of land throughout the empire, to meet the exigencies of the state. The emperor in like manner imposed a distinct and separate tax, called the *lustral collation*, to be paid by the inhabitants of the provinces engaged in trade and merchandize, who, on this as in every other particular, were distinguished from the landed proprietors.

How assessed.

It was the duty of the secretaries of the count of the sacred largesses to apportion to each diocese the amount of the indiction which it was to contribute[1]. The prætorian præfect, or one of his lieutenants, settled the proportion to be paid by each province, and sent a written statement to the governor of each province, indicating the amount. This written statement was published in every principal town of the province. The governor of the province then required the principal de-

[1] Cod. Theod. xi. tit. 5.

curions to select from themselves certain commissioners, to make an equable *adscription* or partition amongst the several possessors of lands in the province. On this adscription a certain proportion of the indiction was assigned to each person according to the amount of his income, as it appeared in the books of the censor of the city to which he belonged. All persons having property in land [1], with the exception of the occupiers of the patrimonial domains of the emperor [2], were liable to contribute their just proportion of the indiction. The emperor Gratian declared, that even if a person should so far impose upon the emperor as to obtain a rescript giving him an exemption, it should be of no avail [3]. The assessment on the individual was not final until the proconsul or governor signed it with his own hand [4]; and the governor was bound personally to go to every town and village, to see that the assessments were equably made [5].

How levied.

The assessment being thus made, the amount was *levied* by a distinct class of persons. The count of the sacred largesses, who resided at Rome, and who had the supreme control of the public

[1] Cod. Theod. xi. tit. 12.

[2] Ibid. xi. 1. 36, which exception is stated to be grounded on this, that the whole income of the patrimonial domains was commonly deputed to the service of the state.

[3] Cod. Theod. i. 2. 7.

[4] Ibid. xi. 1. 3.

[5] Ibid. i. 7. 5. "Per omnium villas sensim atque usitatim vicosque cunctos discurrant, et ultro rimantur, &c.—Præsides."

treasury, sent into each diocese a lieutenant, called a *count of the treasury*. Subordinate to this officer a receiver, "*susceptor*," was appointed for each province, at the general assembly of the province[1]; and under him a certain number of inferior officers were appointed, whose duty it was to collect the duties and taxes of every description, and pay them over to the receiver. The receiver accounted to the count of the treasury, who remitted the amount received by him to the count of the sacred largesses[2].

Superindictions.

Occasionally it was found that the current expenses exceeded what had been provided for by the regular indiction: in such case a *superindiction* was ordered, which was levied in the same manner as the ordinary indiction, excepting that many classes of persons were exempt from payment of this tax[3]: this privilege, however, was often rendered nugatory by the emperor directing the superindiction to be considered as an ordinary indiction[4]. The prætorian prefects and subordinate judges were expressly prohibited by Gratian[5] from imposing superindictions,—a power which they had made the instrument of grievous oppression; though they were subse-

[1] "In celeberrimo cœtu curiæ consensu et judicio omnium." Cod. Theod. xii. 6. 20.

[2] Cod. Theod. viii. 7. 14. et Comment.—Ibid. xii. 6. 17.

[3] Cod. Theod. xi. tit. 6.

[4] Ibid. xi. 5. 2; a law of Honorius.

[5] Cod. Theod. xi. 6. 1.

quently allowed to exercise this prerogative on pressing emergencies.

Lustral collation, or tax on industry.

The indiction was imposed on possessors of land alone; merchants and traders were subject to the payment of the *lustral collation*, the amount of which appears to have been one fifteenth of their gains. This tax was payable in gold or in silver, at stated intervals appointed by the emperor, usually once in every four years. The assessment of this tax was made upon the individuals by commissioners called *mancipes*, who were chosen by the merchants themselves, of whom a register was kept in each city, town, and borough [1]. Lenders of money at interest were liable to this tax [2]; but persons who gained their living by handicraft—as potters, carpenters, and the like—and farmers, who merely sold the produce of the lands cultivated by themselves, were not liable [3], those only who got their living by *buying and selling* being considered as traders, for the purposes of this tax [4]. The merchants, with a view to avoid this tax, in like manner as the farmers in the country to avoid the census or capitation tax, were in the habit of committing themselves to the patronage of some powerful individual, the terror of whose name

[1] Cod. Theod. xiii. 1. 17.
[2] Ibid. l. 18.
[3] Ibid. l. 12.
[4] Ibid. l. 10. and l. 13.

might protect them from the visits of the collectors: to prevent this practice it was ordained, that whoever took such a person under his patronage should be liable to pay the sum which was assessed upon the person so becoming his vassal or client [1].

Process against defaulters to enforce payment.

A list in writing of the defaulters in payment of the taxes was made out by the fiscal notary, or *tabularius* of the province, and by him handed to certain revenue officers called *exactors*, who appear to have been chosen for the occasion from persons of the same rank as the defaulters. These exactors were charged with the levying of the amount due, from the property of the defaulter, if he had any [2]; and for this purpose the exactor might seize the goods of the defaulter by way of pledge, or, if necessary, enter into possession of his lands. If the defaulter still omitted to pay, he was summoned by the exactor before the ordinary judge of the province [3]; and if at the end of two months from that time he still continued in default, the goods or property so taken in pledge might be sold [4]. The debtors of a defaulter might, at the instance of the exactor, be sued by the advocate of the exchequer to make good to the extent of their

[1] Cod. Theod. xiii. 1. 15.

[2] Cod. Theod. xi. 7. 1. & 4.

[3] Cod. Theod. xi. 7. 12. Imp. Gratian.

[4] Ibid. xi. tit. 9.

debts the deficiencies of their creditor [1]. Any person who conceived that an improper levy was made upon him, or that he was in any way aggrieved by the exactor, might cite him before the ordinary judge of the province, and obtain restitution [2]; besides which the exactor was liable to punishment, which in extreme cases was capital, if guilty of extortion [3]. The humanity of Constantine provided that no one should be imprisoned, or even subjected to corporal punishment, on account of any debt due to the exchequer [4].

Mines—monopoly of salt.

Besides the tributes, duties, and taxes, a considerable revenue was derived to the state from the mines belonging to the public. Condemnation to the mines was a common punishment; and unless when the punishment was personal to the individual, he and his progeny were attached to the mine [5]. The revenue from the mines was col-

[1] Cod. Theod. x. 16. 2.

[2] Paratit. in ib. xi. tit. 8. Ib. xi. 7. 1.

[3] Cod. Theod. xi. 8. 1.

[4] Ibid. xi. 7. 3. "Nemo carcerem plumbatarumque verbera aut pondera, aliaque ab insolentia judicum repperta supplicia in debitorum solutionibus, vel a perversis vel ab iratis judicibus expavescat." Et v. ib. l. 7. a law of Constantius.—Gibbon gives an interpretation to the above law of Constantine, vol. iii. p. 95, which is wholly at variance with its literal import; however, in the time of Valentinian this law was openly violated, and numbers of debtors put a period to their existence in the prisons in which they were confined. Amm. Marcell. xxx. c. 5.

[5] Ibid. x. 19. particularly 6. 19. et comm.

lected by the receiver-general of the public taxes of the district.

There was also a revenue derived to the crown from the monopoly of the sale of *salt*[1].

Coronary gold.

The occasional offerings of *coronary gold* may be considered as constituting part of the *private* revenue of the emperors. The presenting of coronary gold had its origin in a custom which prevailed in Italy and in the provinces from the earliest period, of presenting crowns of gold to adorn the triumph of a victorious commander[2]. In the time of the emperors, the crown was exchanged for the more acceptable present of the current gold coin of the empire; and the occasions for presenting this offering were multiplied; and, when any event was announced as a subject of public rejoicing, the customary present of gold was demanded as *a right*. This offering was collected from the inhabitants in the same manner as an ordinary tax, but was presented to the emperor by a delegate chosen for the purpose, in the manner before adverted to.

There was a distinct receiver of the revenue of the emperor, arising from the rents of his private

[1] Cod. Just. iv. 61. 11. Theod. xii. tit. 13. et paratit.

[2] Gibbon, c. xvii. Cod.

domains, who accounted for his receipts to the *count of the privy purse* [1].

The proconsuls or governors were charged, in conjunction with the prætorian prefect, to keep a watchful eye over the concerns of the revenue; it being their duty on the one hand narrowly to observe the conduct of the several persons who were employed in its collection, so as to protect the provincials from extortion, and on the other to see that the taxes and duties were duly paid [2].

[1] Cod. Theod. xii. 6. 20. [2] Cod. Theod. l. 6, l. et 30. comm.

PART THE SECOND.

ADMINISTRATION OF JUSTICE IN THE PROVINCES.

CHAPTER I.

SOURCES OF THE ROMAN LAW.

"Solæ leges quæ in bonum commune procedunt nunquam patiuntur occasum." SYMMACHUS.

The laws, written and unwritten.

BEFORE proceeding to the immediate subject of this chapter, it may be proper to observe, That the laws of the Romans derived their authority during the republic in practice, so far as circumstances would permit, and during the empire in theory, from the GENERAL CONSENT OF THE PEOPLE, which consent was either expressed or implied, whence arose the twofold character of the Roman laws, namely, *written* and *unwritten*: it was a maxim also with the Romans that the laws should be express, and capable of being under-

stood by all[1]; how far this maxim was followed in practice, we shall presently have occasion to notice.

Written Law.

The whole civil and criminal code of the Romans was founded in the law of the Twelve Tables. This code, "*fons omnis publici privatique juris*[2]," was composed of the ancient customs of the Romans, and of compilations from the laws which the Grecian states had received from their various legislators, and was promulgated by the authority of the people at a general assembly, as to ten of the tables, in the year of Rome 303, as to the remaining two in the following year.

Enactments of the people.

To these laws various additions were made from time to time as new cases arose, by enactments made at the *centuriata comitia*, or assemblies of the people by centuries. The division of the people into centuries originated with Servius Tullius, the sixth king of Rome. Before his time, each person had an equal vote at the public assemblies, which were called *comitia curiata*; but Servius divided the people into six classes, according to a valuation of their estates, giving to the richest classes the preponderance of votes at the *comitia*; in return for which the burthens

[1] Valentinian thus expresses himself on this subject: "Leges sacratissimæ quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi præscripto earum manifestius cognito, vel inhibita declinent, vel permissa sectentur." Cod. Just i. 14. 9.

[2] Cic. de Oratore, lib. ii.

of the poorer classes were considerably lessened. However, after the appointment of the tribunes of the people, a new species of assembly, called the *comitia tributa*, came into use; which assemblies were convened by the tribunes alone without the formalities which were requisite for holding the other assemblies. At these assemblies the people met and voted by tribes, not by centuries; in such manner that numbers, and not property or rank, had the preponderance: and though the senators were at liberty to vote at these assemblies, they did not form an essential part of them. The enactments made at the *comitia tributa* were called *plebiscita*, and at first bound only the plebeians; but they obtained the force of laws, in virtue of the lex Horatia and lex Publilia, which were passed respectively in the years of Rome 306 and 414, and were finally confirmed in the year 467.

Senatus consulta.

Experience has shown that *the people* in all ages have been willing to occupy themselves with the discussion of any measure rather than the emendation of the laws relating to the private rights of individuals; and the conduct of the Roman people does not afford an exception to this general observation. There were reasons also which operated to render it inconvenient, if not impracticable, for the Roman people to continue the exercise of the right of enacting the laws by which they were to be bound, had they been desirous of continuing to exercise such right. One of these

causes was the great increase of the numbers of the people, which rendered it inconvenient to call them together so frequently as the occasions for altering the laws demanded; and the persons assembled at such meetings, when convened, were so numerous, that it was impossible conveniently to discuss before them the expediency of enactments relating to civil rights, which always require some minuteness of detail and length of discussion. The frequency also of the wars in which the Romans became engaged, often rendered it impossible to convene the people at times when the making of legal enactments was necessary. From the operation of these causes, the people, in the latter years of the republic, appear to have conceded to the senate by tacit consent the right of making alterations and additions in the civil and criminal code without the concurrence of the plebeians. The laws enacted by the senate alone were denominated *senatus consulta*. Such enactments as were made after the destruction of the republic, down to the reign of Hadrian, were almost entirely in the form of senatus consulta; but, as the ancient assemblies of the people were occasionally held during the reign of Augustus, some legal enactments may possibly have been made at these assemblies [1].

Prætorian law.

The enactments which were promulgated from

[1] Dig. i. 2. 2. Taylor's Civil Law. Ayliffe's Civil Law.

time to time by the authority of the people and of the senate, however numerous, proved to be, as must necessarily have been the case, insufficient to provide for every state of circumstances that might occur in the business of life; and in some cases, the laws, when strictly adhered to, were found to be productive of injustice. It was therefore, in the earliest times of the republic, permitted to the consuls, who at first administered justice as well as commanded the armies, to supply the defects in the written laws, and to temper the rigour of their enactments, as occasion required.

In consequence of the consuls being called from Rome to command the armies, it soon became necessary to appoint a distinct magistrate or grand justiciary for the administration of the law. This magistrate, who was called the *prætor*, was appointed annually; and down to the time of Hadrian, the same power of correcting the written laws was confided to this magistrate, as had been exercised by the consuls, subject, however, to the control of the tribunes of the people during the republic, and of the senate or emperor after the foundation of the empire. The prætor, indeed, was not permitted to abrogate in express terms the laws in force, which still continued to be amended and improved by enactments made by the people or by the senate; but the prætor had authority to vary, extend, and temper the laws, so as to make them to

accord with the circumstances and spirit of the times; and, more especially, he had the power of extending the remedies given by the laws in force to those cases which were within their spirit, but not within their letter. The provincial governors exercised the same authority in the provinces.

On the first institution of the office, the prætor was not, as it would appear, bound to adhere to any precise rules; but, like the consuls, whose jurisdiction was transferred to him, he governed himself in the decision of each case, by the rules of law, tempered by such rules of general equity as he considered to be applicable to the individual case. But it was soon found to be extremely inconvenient to leave to the prætor so great a latitude of discretion. The prætor, therefore, early in the history of the republic, was required to publish a scheme of the alterations, extensions, and modifications of the known and written laws which he intended to introduce, and particularly of the extraordinary actions and exceptions which he intended to grant or allow, in order that the people might know the nature of the code of justice which was to be administered by him. From this time, therefore, every prætor, who did not choose to adopt the edict of his predecessor, published a distinct edict or code; and the law comprised in the edict so published, so long as it remained in force, was called the *jus*

honorarium[1]. The governors of the provinces appear to have adopted the edict which the prætor published at Rome.

Originally the prætor was not confined to the edict which he first promulgated, but might vary or add to it at pleasure, subject, however, to the control of the tribunes of the people; but this power having led to great abuses, it was enacted by the lex Cornelia, which was passed in the year of Rome 686, that the prætor should administer justice according to the edict published by him on first entering upon his office.

Perpetual edict.

The emperor Hadrian introduced a further and most important improvement in the administration of the law; he directed Salvius Julian, a jurisconsult, to form from the edicts of the former prætors a complete code of prætorian law, which should be acted upon by all succeeding judges at Rome and in the provinces. This was accordingly done, and the code so compiled, which was denominated *the perpetual edict*, remained in force until the time of Justinian, excepting where varied by the imperial constitutions.

Imperial constitutions.

The emperors never ventured openly to call in question the principle that laws have their force

[1] "Jus prætorium est quod prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis gratia, propter utilitatem publicam, quod et honorarium dicitur," &c. Dig. i. 1. 7. 1. "Ipsum jus honorarium viva vox est juris civilis." Ibid. i. 1. 8. & i. 2. 2. 10.

only from the consent of the people; but they founded the right which they claimed of making laws on the *lex regia*, which was enacted in the year of Rome 731 or 735, and by which, as it was pretended, the people transferred the exercise of the legislative authority to the emperor [1]. It appears, indeed, that at least down to the reign of Vespasian, some general legislative authority was formally given by the senate to each succeeding emperor; but as laws continued to be made by the senate, the authority so given cannot have been exclusive.

It would appear that the emperors at first did not interfere further than in giving answers to questions of difficulty referred to them by the judges at Rome and in the provinces, and in hearing appeals from the decisions of the judges, and in determining such causes as, from their magnitude or the high rank of the parties, were brought before the emperors in the first instance. Augustus and Tiberius [2], and some of their successors, frequently sat in judgment on the causes so brought before them; but Caligula and Nero de-

[1] Vide Sueton. August. cxxxvii. That some such grant or transfer was renewed by the senate in the succeeding reigns, at least to the time of Vespasian, appears from Tacit. Hist. iv. c. 3. Ammian also adverts to some such transfer on the part of the people in the following passage: "Urbs venerabilis — Cæsaribus tanquam liberis suis regendi patrimonii jura permisit." Lib. xiv. c. 6. p. 16.

[2] See Suetonius in their respective lives.

sired to be relieved from the trouble of deciding questions of so little importance as the private rights of individuals: in their reigns, therefore, all appeals were decided by the senate. Probus, at a later period, conceded the right of hearing appeals to the senate as a boon[1]; but the succeeding emperors appear to have again claimed for themselves the exclusive right of hearing ultimate appeals. The decisions of the emperors and the decrees of the senate would at all times no doubt be considered as settling the law in all similar cases; but it was not until the time of Hadrian that the emperors, openly at least, claimed for their decisions the authority of legal enactments. From the reign of the last-named monarch, the mere will or opinion of the emperor, expressed in any public or official manner, was admitted, in virtue of the *lex regia* and its successive virtual confirmations, to have the force of law[2]. The principal modes in which the will of the emperor was embodied into laws were the following: first, in the form of general *edicts* or ordinances; secondly, in the form of

[1] Vopisci Probus, c. 13.

[2] The following is the language of Justinian, which he adopts from the writings of the lawyers of the preceding ages: "Quod principi placuit legis habet vigorem, quum lege regia, quæ de ejus imperio lata est, *populus ei* (Augusto scilicet), et *in eum* omne imperium suum et potestatem concedit, quodque ergo imperator per epistolam constituit, vel cognoscens decrevit, vel edicto præcepit, legem esse constat. Hæc sunt quæ *constitutiones* appellantur." Just. Inst. i. 2. 6. Cod. i. 17. 7. & v. Dig. i. 2. 2, 11.

rescripts sent in answer to questions propounded to them by the governors, or by delegates sent from the general assemblies of the people; thirdly, in the form of *decrees* made on the hearing of causes brought before the emperor by way of appeal; and, fourthly, in the form of *orations*, which the imperial questor or chancellor read to the senate [1]. In all these cases the will of the emperor so expressed had the force of a general law throughout the empire, unless where there was a manifest intention to confine the ordinance or decision to the particular case [2]. The rescripts or decrees, in which the will or opinion of the emperor was embodied, were registered in the imperial archives, and in the palace of the governor to whom they were directed, and received the general name of constitutions, and formed a most important branch of the written law of the empire.

Hadrian and his successors appear to have devoted much of their time, assisted by the most celebrated jurisconsults, to the consideration of questions referred to them from the provinces, and to the emendation of the civil and criminal codes.

Gregorian. Hermogenian, and Theodosian codes.

In the time of Valerian, the imperial constitutions promulgated, from Hadrian downwards, were collected into a code by a jurisconsult named Gregorius; and those of the several emperors, from Valerian to Constantine, were in a similar

[1] Cod. Theod. i. tit. 1. Paratit.

[2] Inst. 1. tit. 2.

manner collected and published by the jurisconsult Hermogenes. These collections, of which some fragments yet remain, were made without any public authority; but, by command of the emperor Theodosius the younger, about A. D. 438, the constitutions of the emperors, from Constantine down to his own time, were collected into a code, which is still extant. This code is far from possessing that consistency and harmony, either of matter[1] or of arrangement, that is looked for in a code of laws promulgated by authority, but as an historical document it is perhaps one of the most valuable monuments of Roman antiquity.

UNWRITTEN LAW.

The unwritten law consisted of the *jus civile* and of *ancient customs*.

Jus civile.

After the promulgation of the laws of the Twelve Tables, and the other legal enactments, questions naturally arose as to their true interpretation. Originally the college of priests, one of whom, until the appointment of the prætors, appears to have been annually chosen to assist in the administration of the laws, assumed to themselves the exclusive privilege of expounding the laws, and of

[1] Thus, in the 2d title of the first book are the two following edicts: "Contra jus rescripta non valeant, quod enim publica jura præscribant magis sequi judices debent," l. 1; and immediately afterwards, "Multabuntur judices qui rescripta contempserint;" both laws of Constantine.

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settling the formulæ for the institution of civil actions, which formulæ were framed from the written laws, and adapted to their provisions [1]. This privilege in later times was not confined to the college of priests; but the patricians, who with some exceptions alone exercised the profession of jurisconsults, appear during the republic to have succeeded in reserving to themselves exclusively the exposition of the law. In order to give due solemnity to these expositions, the questions were discussed in the forum at public disputations; the decisions, or interpretations, which were there adopted, were drawn up in the form of glosses and treatises, and by general assent were allowed the force of law in all the public tribunals [2]. The high-priest Quintus Mucius Scævola first collected these glosses and treatises into one body, in a work consisting of eighteen books.

The patricians also appear to have endeavoured with anxious care to reserve to their own order the mystery of framing the formulæ for proceeding in civil suits. Authentic copies of these formulæ

1 "Omnium tamen harum et interpretandi scientia, et actiones, apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno præesset privatis, et fere populus annis prope 100 hâc consuetudine usus est." Dig. i. 2. 2. § 6, &c.

2 "Authoritas prudentum est *concors jurisperitorum* sententia in cavendo conscribendo formulas, et jure interpretando, et ea descendunt quæcumque *consensu* et moribus recepta dicuntur." Inst. i. 17. et vide ibid. ii. 17. iii. 11.

were registered and preserved by the patricians; and for some time they succeeded in keeping them concealed from the public. By this means the patricians insured to themselves a considerable portion of influence, for as no one could proceed at law excepting according to these formulæ, every suitor was necessarily obliged to secure the assistance of a patrician before he could commence his suit. Appius Claudius having made a collection of these formulæ for his private use, they were published by Cnæus Flavius his secretary; and other forms having subsequently been settled by the jurisconsults, a collection of these additional formulæ was published by Sextus Ælius. These collections were respectively called the *jus civile Flavianum*, and *jus Ælianum* [1].

In the time of the emperors, the *jus civile* was greatly enlarged by treatises written by the most famous jurisconsults, particularly those who flourished from the reign of Augustus to that of Severus, and by collections of their written opinions. Augustus, conceiving that it might be dangerous to his government if the exposition of the law were intrusted to any but those in whom he could confide, ordained that no one should give opinions, or presume to expound the laws, unless he had obtained the sanction of the emperor. Hadrian removed this restriction, and allowed a

[1] Dig. i. 2. 2.

general licence to exercise the profession of jurisconsults to all who considered themselves competent to perform its duties; but Severus renewed the restrictions imposed by Augustus. The numbers and bulk of the treatises which composed the *jus civile* were at length productive of the most serious inconvenience. Labeo alone wrote 400 books, and Capito, his contemporary, at least 259. The emperor Valentinian, with the view of lessening this inconvenience, published an ordinance, whereby he directed, that in future no treatises or opinions should be cited as authority but those of Ulpian, Papinian, Paulus, Gaius, and Modestinus, and such parts of the treatises and opinions of the more ancient jurisconsults, as Scævola, Sabinus, Julian, and Marcellus, as were cited and incorporated in the works of the above-named jurisconsults. Where there was a difference of opinion in the works of the five above-named jurisconsults, the majority was always to prevail. Where the opinions were equal on each side, the casting voice was given to that of Papinian [1].

Customary law.

The other branch of the unwritten law was made up of the *ancient customs* used and approved amongst the people; of which some were local, and applied only to particular parts of the provinces; others were general, and extended over

[1] Cod. Theod. xii. 1. 68. From this time perhaps the *jus civile* might properly be classed under the *written law*.

the whole empire; these customs having the same foundation as the written laws, namely, the general consent of the people, were admitted to have equal authority [1] with those laws which had their origin in formal enactments.

Such were the sources, and such the various descriptions of the laws of the Romans. These laws, as they were founded on general consent, might of course be repealed either by an express enactment, or by tacit consent, of which a long continued contrary usage was considered as sufficient evidence [2].

I now proceed to give a concise account of the laws which prevailed in the Roman provinces at the time of the irruption of the barbarians, occasionally adverting to those which were subsequently introduced, following, as nearly as possible, the order of the Institutes of Justinian.

[1] "Omne jus," says Julianus, "aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo; nam cum ipsæ leges *nulla alia ex causa* nos teneant quam quod *judicio populi* receptæ sunt, merito et ea quæ sine ullo scripto populus probavit tenebunt omnes." Dig. i. 3. 31. et seq.; Ib. xxxiv. 35. 36.; Cicero de Invent. Rhet. ii. 22.

[2] Inst. i. 2. 11.

CHAPTER II.

LAWS OF THE ROMANS.

THE laws of the Romans may conveniently be classed under five general divisions.

First, Those which concerned the distinctions of *persons*, and the relations which existed between individuals.

Secondly, Those which related to *property*.

Thirdly, Those which related to the rights of individuals in respect of their *transactions* with others, and to the claims arising from the *conduct* of individuals;—or the laws relating to *obligations*.

Fourthly, Those which related to the enforcing by legal means the rights and claims of individuals;—or the laws which concerned the machinery of *actions*, and the *defences to actions*.

Fifthly, The laws relating to *public offences*.

SECTION 1.—OF PERSONS, AND RELATIONS BETWEEN INDIVIDUALS.

Of persons. In describing the inhabitants of the cities, and of the country, I have had occasion to enter at large upon the distinctions of persons in the Ro-

man provinces, and to notice some of the relations between individuals recognised by the law. The distinction of persons into slaves and free, and of freemen into those who were absolutely free, and those who had obtained their freedom by manumission, has been noticed; and the mutual relation of patron and freedman has been explained. I proceed therefore to the other principal relations between individuals, namely, those of husband and wife, parent and child, and guardian and ward.

Husband and wife.

Marriage, by the Roman law, was founded on the consent of the parties. When the parties were under the power of their parents the consent of such parents was also essential to the contract; but the parent who harshly and unjustly denied his consent might be compelled by the proconsul, or governor of the province, at the instance of the child, not only to express his concurrence in the marriage, but to give the requisite dotal portion [1]. It was considered so essential that this consent should be free and unrestrained, that no person exercising authority in any province could marry in such province: he might, however, enter into the contract of espousals; but the female was at liberty to confirm or renounce the contract when the intended husband had laid down his dignity or command. Guardians, also, could

[1] Dig. xxiii. 2. 19.

neither marry their female wards nor give them in marriage to their sons [1].

Espousals. It was almost the universal practice, in the latter years of the empire, for the parties to enter into a regular contract of espousals, even when the marriage was intended to be immediately celebrated [2]. This contract, like all other mutual obligations, was completed by the expression of the consent of the parties; it was however usual for the spouse to deliver to his intended bride something in the way of earnest; and for this purpose a ring was commonly used, which was sent to the damsel, to be placed on the fourth or wedding finger, it being supposed, on the credit of Appion, that the Egyptians had discovered that there was a direct communication, by means of a slender nerve, from that finger to the heart [3]. Originally an action at law would lie for a breach of such contract; but, in latter times, a promise of marriage came to be deprived of its legal effects.

Dowry. It was considered to be the duty of the father to give to his daughter a marriage portion or dowry according to the measure of his property. Such dowry was called *dos profectitia* [4]; and when the daughter died, it reverted to the father. Any person might give the marriage portion, but

[1] Dig. xxiii. 2. 38. 59.
[2] Ibid. xxiii. 1. 1 and 4.
[3] Aul. Gell. x. c. 10.
[4] Dig. xxiii. 2. 19. Gothof. not. and Cod. Just. v. ii. 7. Dig. xxiii. 3. 5.

no one could claim the right of reversion but a father [1]. The dowry might also be constituted of the property of the woman; and a daughter, if of full age, and not in her father's power, might herself constitute her dowry from her property; and such dowry, on the death of the husband, reverted to the wife [2]. The intended husband, on the other hand, stipulated to bring into the marriage state, for the mutual benefit of himself and wife, a certain proportion of his property, which was denominated the *donatio propter nuptias* [3]. The husband, during the marriage, was considered as the owner of the dowry, and was entitled to the use of it, for defraying the charges of the marriage [4]. The property of the wife, beyond what was brought in as her dowry, was denominated her *parapherna*; and the husband had no right, even of community, over it, excepting by consent of the wife [5].

The celebration of the *marriage rite* [6] was performed in different ways. First, if a woman who had no parent, by the consent of her guardians, after espousal [7], lived with a man as his wife for one year, without being absent for three nights, Marriage rite. Usucaption.

[1] Dig. xxiii. 3. 41. Domat. i. 9. § iii. c. 11.
[2] Cod. Just. v. 11. 4. Ibid. v. 18. 11. Dig. xxiii. 3. 12.
[3] Inst. ii. 7. 33.
[4] Dig. xxiii. 3. 7.
[5] Cod. Just. v. 14. 8. 16. 17.
[6] Rosinus de nuptiis et earum ritibus, p. 423, et seq. Dig. xxiii. 2. 5. tit. 1. l. 9. And see Adams's Antiquities, p. 459.
[7] Rosin. p. 430.

she became the lawful wife of such man by *usucaption*, a custom which apparently had its origin in the Rape of the Sabines. The second method, which was the most usual, was that of *coemption*. According to this form, the bride and bridegroom mutually expressed to each other their willingness to become husband and wife, according to a set form of words; the bride then paid to the bridegroom a certain sum as the fictitious purchase of a right in her husband's succession. This ceremony was performed at the house of the father, or nearest relative of the bride; who was then taken home by the husband, attended by the groom's men and bridemaids, and the other friends of the newly married couple in procession. Originally there was a third form of marriage, namely, by *confarreatio*, which was purely a religious ceremony, but which had become antiquated in the time of Tacitus, and even of Cicero. Prior to the consummation of the marriage, a supper, served with all the splendour and profusion that the means of the bridegroom would allow, was given to the groom's men, and bridemaids, whose duties after supper were such as might have been assigned with more delicacy, perhaps, to matrons. It was a common practice for the friends and relations to testify their satisfaction by presenting gifts to the newly married bride.

Coemption.

Confarreatio.

Incestuous marriages, namely, those which took place between parents and children, even by

adoption, brothers and sisters, and other near relations, within the degree of first cousins [1], were absolutely void, and the parties contracting such marriages might be proceeded against criminally [2].

The wife, from the time of her marriage, became completely in the power and under the command of her husband, and, after his death, was ranked as one of his natural representatives, and had a right to claim a share in his succession together with his children.

If either of the parties were made captive, and were not heard of for five years, or reduced to a state of slavery, the marriage was dissolved [3].

By the *jus civile*, before the introduction of Christianity, great latitude of divorce was allowed to both sexes. Indeed it would appear that, if either party came to a deliberate determination to be divorced, the same might be effected by such party sending to the other a *libellum repudii*, declaring, in a set form of words, that the marriage-contract was at an end, and either party was then at liberty to marry again [4]. However the law Divorce.

[1] Inst. i. 10. § 4.

[2] Inst. i. 10. § 1. 2. 3. 5. 6. 7. 9.

[3] Dig. xxiv. 2. 1. and 6.

[4] "Divortium *jure civili* dissolvere solet matrimonium." Dig. xxiv. 2. 11. "In repudiis autem, id est renunciatione, comprobata sunt hæc verba: *Tuas res tibi habeto.*" Ibid. tit. 2. 2, 1. "Divortium non est nisi verum, quod animo perpetuam constituendi dissensionem fit; itaque quicquid in calore iracundiæ vel fit vel dicitur, non prius ratum est quam si perseverantia apparuit judicium animi fuisse:

in regard to divorce was materially altered by Constantine, who ordained that no husband should divorce his wife, or wife divorce her husband, excepting for certain defined causes. According to the law as so altered, the husband was entitled to put away his wife for incontinence, or in case she were guilty of poisoning, or of acting as a procuress [1]. If a man put away his wife for any other cause than the above, he was prohibited from marrying again, and the wife, to whom such an indignity was attempted to be offered, was entitled to take possession of her husband's house and property, and the dowry which he had acquired from the newly taken wife. The wife was entitled to divorce her husband if he were convicted of murder, or poisoning, or the violation of a tomb; but, if she accused her husband of any such crime, and did not prevail, she forfeited her dower, and was liable to banishment. [2] The emperors Theodosius and Valentinian found it necessary to allow greater latitude; they therefore admitted some other grounds of divorce [3].

Paternal power.

The children of marriages duly solemnized, and

ideo per calorem misso repudio si brevi reversa *uxor* est, nec divortisse videtur." Dig. xxiv. 2. 3. These laws were revived in the Code Napoleon.

[1] *Conciliatrix.*

[2] Cod. Theod. iii. 16. 1. and 2.

[3] Cod. Just. v. 17. 8. "Sicut enim," say the emperors, "sine justa causa dissolvi matrimonia justo limite prohibemus: ita adversa necessitate pressum vel pressam quamvis infausto attamen *necessario* auxilio cupimus liberari."

their issue, were under the *power* of the father. This *power*, which was peculiar to the Roman law, and which originally extended to life and death, was extinguished by the death, either natural or civil, of the father, or by the *emancipation* the child. Emancipation, according to the ancient law, was effected by a fictitious sale[1]; but the Emperor Anthemius introduced the custom of emancipating before a magistrate, which, from his time, was the ordinary method pursued[2]. Emancipation.

The childless husband, and every unmarried man above the age of eighteen, might acquire to himself children, over whom he might exercise the same rights as the natural father, by the artificial mode of *adoption*, which was effected either by the authority of an imperial mandate, or by a solemn adoption of the child, before the governor of the province[3]. Adoption.

Male children were considered as infants, and as such incapable of having any discretion or will, until they attained the age of fourteen; females until the age of twelve; and, in case of the death of their father before they attained that age, were placed under the tutelage of a guardian. There were three modes by which tutors were appointed to infants, the first of which was *by will*. Every father was entitled by law to appoint Guardian and ward. Tutors.

[1] Inst. i. 12. § 6.
[2] Vinn. ad Inst. p. 84.
[3] Inst. i. tit. 11.

tutors to his infant children living at his death, and not emancipated by him, and in some cases to his grandchildren; and if a father, by will, appointed a tutor to an emancipated child, the judge was bound to confirm the appointment without inquiry. Where no testamentary tutor was appointed, the nearest relations in the male line, deriving their relationship solely through males, were, by the ancient law, entitled to the guardianship; and, in default of any such, a tutor was assigned to the minor by the prætor at Rome, and the proconsul or governor in the provinces [1]. Great inconvenience, however, was found to result from adhering to the rule so established by the ancient law; for, as the nearest relations, whether competent or not to the discharge of its duties, claimed the office by right, no security could be taken from them. In the time of Claudius, a remedy was provided against this inconvenience by requiring every tutor other than such as was appointed by the father, to give security for the due administration of the office. The Emperor Antoninus assumed to himself, as *parens patriæ*, the protection of all infants and minors; and, from his time, the care and protection of the persons and property of infants was specially delegated by the emperor to the prætor at

[1] Inst. i. tit. 20. et Comment.

Rome, and the proconsul or governor in the provinces [1].

The duties of the tutor consisted, first, in exercising a superintending care over the person of his ward, and having him properly educated and instructed, according to his means: secondly, in the management and care of the infant's property. But the office of the tutor was not ministerial only; all contracts entered into by the ward, with the authority of the tutor, were binding on the ward; and if the ward, by the authority of his tutor, accepted a succession, either on intestacy or under a will, he was bound by such acceptance.

Curators

At fourteen with males, at twelve with females, the authority of the tutor ceased; but no child, until twenty-five, was considered as competent to have the management of his property. Until that age, therefore, he remained under the care of a curator, who was appointed by the governor of the province [2]. All tutors and curators in the provinces, excepting testamentary tutors, were obliged to find sufficient sureties, who became bound for them before the *duumvir*, or *defensor civitatis*, or the governor of the province, for the faithful discharge of their duty; the duumvir, or defensor, when the sureties were taken before those magistrates, and the secretary of the governor, when the

[1] Inst. i. 20. 4.

[2] Ibid. i. 23. 1.

sureties were taken before the governor, were bound at their peril to see that the sureties were responsible [1]. No one was allowed to refuse the office of tutor, unless he had a sufficient excuse: the not being able to find sufficient sureties, the having five children, and being engaged in public business, were allowed to be sufficient excuses; a person might also excuse himself on the ground of the existence of a deadly feud between his family and that of the minor [2]. The enforcing of the performance of the duties of tutors towards their wards belonged to the extraordinary jurisdiction of the prætor: I shall therefore have occasion to recur to this subject in a future page. I proceed to the next division of the subject, namely, the laws which related to the rights which might be acquired in regard to property.

SECTION 2.—LAWS RELATING TO PROPERTY.

§ 1. *Of the different kinds of Property.*

Things which could not become *private* property.

There were some things which, according to the Roman law, could not be the subject of individual ownership: such were the shores of the sea, ports, havens, and rivers; all of which were *public property*. The public also had a right to the use of the banks of navigable rivers; therefore a qualified ownership in the soil of such banks was all that

[1] Inst. i. 24. 2. [2] Ibid. i. 25. § 1. 2. and 11.

could be acquired by individuals [1]. The theatres, stadia, and forums, were distinguished as *res universitatis*. Temples, sepulchres, and consecrated places, in which were included the walls and gates of cities, to violate which was punished with death, were called *res nullius* [2]. It is also to be observed, that there were some things in which no property could be acquired excepting by possession or occupancy: of this description were peahens, pigeons, and other birds wild by nature: and it made no difference that the pigeons were kept in a dove-cot, to which they were in the habit of returning [3]: however cocks and hens, and geese, when tamed, were considered as private property. As occupancy alone conferred a title to things wild by nature, it followed that he who caught any wild birds on the land of another obtained the absolute property in the birds, though he had been warned off, and was therefore guilty of a wrong in regard to the owner of the land, and the title to such things remained only so long as they continued in the actual possession of the taker [4]. Justinian, in his Institutes, in order to illustrate the mode of acquiring title by occupancy, takes occasion under this title to notice the technical distinctions in regard to the acquiring of property by *alluvion*, *confusion*, *commixtion*, and *conjunction*, but which I pass over

Things property in which was acquired by occupancy alone.

[1] Inst. ii. 1. § 1—5.
[2] Ibid. ii. 1. 10.
[3] Ibid. ii. 1. 12—15.
[4] Ibid. § 12.

as subjects rather of curiosity than of use, and proceed to the general division of property into things *corporeal* and *incorporeal.*

Things corporeal and incorporeal.

Things *corporeal* comprised every tangible matter. *Incorporeal* things were more properly rights enjoyed in respect of things, than things themselves. *Servitudes* composed the most important class of things incorporeal. Servitudes were of two kinds, rustic and urban. *Rustic* servitudes included all such rights as the owner of one farm in the country might claim over the farm of another, as a right of passage, or of way, for himself, his cattle, or his carriages, or of bringing water to his home. *Urban* servitudes were such as existed in respect of buildings in towns: the principal that are mentioned by Justinian are the obligation of supporting the roof of another's house, and of so building on your own land as not to obstruct the ancient lights of the adjoining house of your neighbour. Servitudes of the above descriptions could only be claimed as appurtenant to property, either predial or urban. Under the head of incorporeal things was also comprised the class of servitudes which were called *personal* servitudes, as being inherent in the *person* of the claimant, and not appurtenant to his property: of these there were three kinds, *ususfructus*, *usus*, and *habitatio*. The right of using another's goods in any manner the user should see

Servitudes.

fit, he preserving the substance [1], or, in case it were money, of returning the like quantity to the owner, with the power of assigning this right, was called *ususfructus:* when the right to use the thing, or its profits or produce, was confined to the individual, it was called *usus;* and the usuary, in such case, was not at liberty to make any emolument of the thing, but only to use it for his necessary occasions [2]: *habitatio* was the right to use the *house* of another; this right was not assignable until the time of Justinian [3]. A title to incorporeal things might be acquired by a quasi prescription, though not by usucaption [4].

Things moveable and immoveable.

Corporeal things were distinguished into *moveable* and *immoveable: moveables* consisted of money, goods, and every kind of property, excepting land, and things attached to land, which were called *immoveables.*

I now proceed, following the order of the Institutes, to give an account of the manner of acquiring title to such things as were capable of individual ownership, by the peculiar or civil law of the Romans.

[1] Inst. ii. 4. pr.
[2] Dig. vii. 8. l. 10 and 14.
[3] Inst. ii. 4. ii. 5. pr. 4. and 5. Cod. Just. iii. 33. 13.
[4] Dig. xli. 1. 43. § 1. et Gothof. not.

§ 2. *Modes of acquiring Property by the Roman Law.*

1. *In Individual Things.*

Prescription.

The first mode of acquiring property in individuals or things was by length of possession or prescription [1], which was introduced in the earliest period of the history of the law for quieting possession, and avoiding uncertainty as to the ownership of property.

Before the time of Justinian, if any one, under a sale, gift, or other just means of acquiring property, completed in due form, obtained possession of another's property not having notice of the real owner's title, and retained it undisturbed, if a moveable, for one year, if immoveable, as of a farm in Italy, or such parts of the provinces as enjoyed the *jus Italicum*, for two years; he acquired a title to the thing possessed, as against even the real owner, who was considered to have had ample time within those periods for claiming his property. Justinian, it may be remarked, altered the law, by making three years undisturbed possession a title to moveables, and ten years for immoveables, when the owner was within the kingdom; twenty years if absent; and that throughout all his dominions [2]. Thirty years undisturbed pos-

[1] Inst. ii. tit. 6.

[2] Ibid. ii. 6. pr.

session in general gave a good defence by way of exception, even when the possessor had come in under no title [1]. To things stolen, or things belonging to the crown [2], no title could be acquired by prescription. The time which began to run in the life of the ancestor continued to run in favour of the heir or representative, even though he might have notice of the infirmity of his ancestor's title [3].

The second mode of acquiring property in individual things by the jus civile was by donation.

Donations. Donations were of two kinds:

1. *Mortis causa*, or having reference to death.

2. *Inter vivos*, or not having reference to death.

mortis causa. A *donatio mortis causa* was where a person in danger so gave a thing, that, in case he died, the receiver was to have it; but if he recovered, the donor was to receive it back again. Gifts of this nature were analogous to legacies [4].

inter vivos. Gifts *inter vivos*, by the ancient law, were complete as soon as the donor had manifested his intention to give, either by writing or without writing; though, to prevent imposition, it was declared, in the time of the emperors, that when the gift exceeded a certain amount, such gift should not be valid unless an instrument of gift were reduced into writing by a notary, and attested by a magistrate [5]. No gift actually perfected

[1] Cod. vii. 39. 3. Imp. Honor.
[2] Inst. ii. 6. 2. and 4.
[3] Ibid. ii. 6. 7.
[4] Ibid. ii. 7. 1.
[5] Ibid. ii. 7. 2.

could be recalled except for ingratitude [1], which had the effect of annulling every act of mere beneficence.

Sale and purchase.

The third mode of acquiring individual things, though not mentioned by Justinian under this title, was by *purchase*.

Every thing that was the subject of commerce, whether moveable or immoveable, corporeal or incorporeal, might be bought or sold. Those things only, generally speaking, were out of commerce which were *sacred* or *public* property, as has before been mentioned. Farms situate in Italy, slaves, and servitudes, were by the ancient law passed by the solemn form of *mancipation* [2]; but this form of transferring property does not appear to have prevailed in the provinces, where sales of every kind of property were effected by the mere contract of sale and purchase, accompanied or followed by delivery, or quasi delivery [3], and generally a written document, to evidence the transaction. The contract of sale and purchase was complete when the parties had agreed definitively upon the thing and the price [4]. Writing was not necessary in any sale, unless it formed part of the contract that it should be drawn up in writing [5].

[1] Inst. ii. 7. 2.

[2] As to which see Rosinus, Adam's Roman Antiquities, p. 51, and Gibbon.

[3] Vide *ante*, p. 32.

[4] Dig. xviii. 1. 9 and 10.

[5] Cod. iv. 21. 17. et Gothof. not. (a.)

Delivery does not appear to have been considered as absolutely necessary [1] to perfect the contract in any case. Earnest, *arrha*, was occasionally demanded, with a view of shewing that the terms were agreed upon and of securing the completion of the bargain, as it was commonly stipulated that unless the bargain were completed by the purchaser within a given time, he should lose his earnest money. Arrha.

All persons of competent age and understanding, with some few exceptions, might alienate the property of every kind of which they were the owners. Some artificial restrictions upon this general right have already been mentioned, and there were also the following amongst other exceptions. The husband, though considered as owner of a dotal farm, was restricted from alienating it: this restriction, before the time of Justinian, extended to Italy only; Justinian prohibited such alienation in the provinces, even with the consent of the wife [2]. On the other hand, a creditor, to whom property was pledged, though not considered as the owner by the pledge, yet might sell the property if the money were not paid at the time [3]. A minor was restricted from alienating the property of which he was the owner [4], unless by the intervention of his legal guardian. Of those who had power to alienate, and those who had not such power.

According to the Roman law, a man might Of property acquired by means of others.

[1] See the authorities quoted in Ayliffe's Civil Law, p. 438.

[2] Just. Instit. ii. 8 pr.

[3] Ibid. ii. 8. 1.

[4] Ibid. ii. 8. 2.

acquire property, not only by himself, but by those under his power, namely, his slaves, and children not emancipated[1]; for such slaves and children being under the absolute power of the master and father, all property given to them, or acquired by them, excepting their *peculium*, belonged to the master or father. The peculium of a child not emancipated, and of a slave, consisted of the property which such son or slave acquired for themselves; with the consent of the father or master, from their own industry or by gift[2].

Peculium.

The above were the methods by which a title to single or individual things, or to any determinate number of things, might be acquired. I proceed, according to the plan of Justinian, to mention how a title to the entirety of the succession or property of another might be acquired.

2. *Modes of acquiring Property in an Entire Succession.*

An entire inheritance or succession might be acquired,

1. Under a will or testament.
2. By succession to an intestate[3].
3. By adrogation.
4. By purchase of the entire estate of a defaulter or insolvent.

[1] Inst. ii. 9.

[2] Dig. xv. tit. 1. l. 5. § 4. of the enlargement of the filial peculium. See Gibbon, viii. p. 54.

[3] Inst. ii. 9. 7.

TITLE BY WILL OR TESTAMENT.

Form of making Wills.

There were anciently three modes of making wills or testaments in use amongst the Romans, all of which had their origin in the *jus civile*.

Different modes of making wills according to the ancient law and imperial constitutions.

1. By means of a fictitious sale, made in the presence of a general assembly of the people, *calatis comitiis*. Such a will was required to be attested by several witnesses [1].

2. *Per æs et librum.* According to this form, the intended successor, in the presence of five witnesses, with certain formalities, made an imaginary purchase of the inheritance of the testator.

3. A man, just before proceeding on a military expedition, was permitted to make a will without the ordinary solemnities. This sort of will was called a will *in procinctu*.

The first and third of the above methods went out of use even during the republic; the second still remained in use down to the time of Justinian.

4. In process of time another form was introduced, namely, of making written wills attested by the seals of seven witnesses. Wills of this nature owed their origin and validity to edicts of the prætors alone; another instance of *prætorian legislation* [2].

5. By the constitutions of the emperors, it was declared that wills of the latter description should

[1] See Gibbon, c. xliv. p. 78. vol. viii.

[2] Inst. ii. 10. 2.

be signed by *the testator*, or some person for him [1], in the presence of seven witnesses, called for this express purpose [2], and attested in the presence of the testator, under their hands and seals [3], or under their seals only [4]. Justinian required a further formality, namely, that the name of the heir should be written by the testator or by one of the witnesses [5].

Of the witnesses.

Some persons were disabled from being witnesses, and particularly the heir, and those who were in his power; it being considered that the making of a testament was a transaction between the testator and the heir (a notion which originated in the fictitious sale which took place under the ancient form of making a will), and no one could be witness in his own cause [6]. But legatees, as they were not the successors or representatives of the testator, and therefore not open to the same *technical* objection, might be witnesses to their testator's will [7].

A will might be written on any substance capable of receiving legible characters [8].

Nuncupative wills, according to the imperial constitutions.

A person might, by mere verbal declaration, make an effectual will, provided it were done in the presence of seven witnesses [9]. The military might make wills without any of the above formalities:

[1] Cod. Just. v. 23. 28, 1.
[2] Domat. ii. p. 19.
[3] Inst. ii. 10. 3.
[4] Cod. Just. vi. 23. 12. a law of Diocletian.
[5] Inst. ii. 10. 4.
[6] Ibid. § 10.
[7] Ibid. § 11.
[8] Ibid. § 12.
[9] Ibid. § 14. Cod. Just. vi. 23. 21, 2.

all that was required was sufficient evidence of their intentions in regard to their property [1].

All persons were competent to make a will, excepting those who were in the power of another; minors, lunatics, and persons who were habitual prodigals.

Rules relating to the Substance of the Will.

The above were the *forms* requisite in the making a will. There were also various rules necessary to be observed as to the *substance* of the will, and first,

Institution or disherison of children.

It is to be observed that, according to the strict law, no will could be effectual unless some one or more persons, in the Roman law called heirs, were appointed to represent the testator. He who had a child [2] not emancipated, or an adopted child, was obliged expressly to disinherit him, or appoint him his heir, or his will was of no avail [3]. Justinian, who evinced great anxiety to put both the sexes on an equality, abolished the distinction which had before existed as to females, declaring that all children, whether male or female, should be disinherited by name [4].

Any person might be appointed an heir—a slave

[1] Inst. ii. 11. pr.

[2] This rule did not prevail in regard to the will of a mother or maternal grandfather. Inst. ii. 13. 7.

[3] Inst. ii. 3. pr. and 1. 2. and 3.

[4] Ibid. ii. 13. 5.

as well as a freeman [1]: and any number of heirs [2] might be appointed [3]. No one could die partly testate, partly intestate. If a person appointed an heir for any portion of his property, without naming heirs for the rest, such heir, as representing his testator, became entitled to the whole inheritance; so if one of many heirs died, his share accrued to the survivors [4].

Modes in which the heir might be appointed.

The heir might be appointed simply, or on condition; but no one could suspend the institution of his heir until a period which *must* arrive after his death, and therefore, in a will framed with this object, so much of the clause as related to the time was rejected, and the heir was considered as heir from the death [5]. When an inheritance was given on condition, as in case of the marriage of the heir, until that event happened the testator was considered as completely intestate, and the inheritance descended to the heirs, who would have succeeded on an intestacy. But on the performance of the condition, the testator was considered as completely testate, and the appointment had relation back to the death of the testator, and the heir represented the testator from that moment. The reason for rejecting the time, in the first case, was this: in the nature of things, a specified period of time

[1] Inst. ii. 14. 1. 2. 3.

[2] *Heir* is here used as synonymous with *representative*.

[3] Inst. ii. 14. 4.

[4] Ibid. ii. 14. 5. et Vinnii Comment.

[5] Ibid. ii. 14. 9.

to arrive after the death of the testator, could not be carried back by relation to the day of his death; so that, in case the heir had been considered as instituted from the time appointed, there would have been an intermediate time, which could not have been overreached, and for that space of time the testator must have been considered as intestate; but as the law, in its *infinite wisdom*, did not allow that a man should die both testate and intestate, the knot was cut by expunging the time from the will [1]. Impossible conditions were rejected [2].

Of the common substitution of heirs.

A testator might appoint one man as heir, and if such heir should die, or refuse to take the inheritance, then another, by way of substitution, and that for any portion of the inheritance [3]. This was called the common substitution of heirs.

Of the pupillar substitution.

So a man having a child, a minor, not emancipated, might appoint that such child should be his heir, and that in case such child should not become heir in fact, or if, having become heir, he should die under age, then that another person should be heir; thus in effect, in the latter case, making a testament for the minor [4]. As the life of the minor might be in danger from the person

[1] Inst. ii. 14. 9. et comm. This and similar reasoning, to be found in the Pandects, may vie with some of Lord Coke's most profound expositions of the reasons of the law.

[2] Ibid. ii. 14. 10.

[3] Ibid. ii. 15. pr.

[4] Ibid. ii. 16. pr. and 2.

so substituted, it was recommended to testators making such wills to seal up that part of the will which contained the substitution, and to direct that it should not be opened during the minority of the child [1]. These were the principal rules relating to the making of a formal and perfect will.

How wills might be annulled.

A will might be annulled in three ways:

1. By subsequent adoption of a child, or children, or the subsequent birth of a child.

2. By a subsequent perfect will [2].

3. By civil death [3].

Inofficious wills.

A will, which was perfect in regard to all its formalities, might become *inofficious* or ineffectual by reason of the non-observance of certain rules, which every testator was bound to follow, in the disposition of his property. Thus, if the children of a parent were disinherited without good cause, they might institute a complaint to the ordinary judge to have what was called the *legitimate portion* of the testator's inheritance assigned to them, which, before the time of Justinian, was one-fourth of the entire property; but the parent had a right to distribute this fourth in any way he chose, so long as all the children were included in the distribution [4].

[1] Inst. ii. 16. 3. 8.
[2] Ibid. ii. 17. 2.
[3] Ibid. ii. 17. 4.
[4] Ibid. ii. tit. 18. Cod. Just. iii. 28. 6. 7. 8.

The heirs, who were appointed by a testator, had different duties and characters, according as they were slaves, or children of the testator, or strangers. Of the different kinds of representatives.

If a slave were appointed heir, he was compelled to undertake the representation, with all its burthens, as well as its benefits, whatever might be the amount of the debts and engagements of his testator: he in fact became the complete representative of the testator. Slaves.

By the ancient law, the children and grandchildren of the testator, who were denominated the *sui*, or *necessarii hæredes*, were also bound to assume the inheritance, with all its burthens; but at length, the prætors, by successive edicts, permitted children and grandchildren, if they thought fit, to reject the inheritance, and thus relieve themselves from the debts and obligations of the ancestor[1]. This right was ultimately established by the perpetual edict. Children.

Strangers were at liberty to accept or reject the inheritance; but if they once accepted, they could never after renounce. Hadrian indeed permitted some particular person, who, after he had accepted the inheritance, discovered debts to a large amount, to renounce the inheritance; but this does not appear to have become the general law; and it was not until the time of Justinian that the *benefit of inventory* was introduced. A person who accepted, Strangers.

[1] Inst. ii. 19. 2.

with benefit of inventory, protected himself from being liable to the debts beyond the amount of the testator's inheritance [1].

A stranger who, either under a will or by succession, became entitled to an inheritance, was considered as heir from the moment he either expressed his assent, or dealt with the property as heir [2]. Justinian, instead of proceeding to the second mode of acquiring an entire inheritance, namely, by intestacy, proceeds, as connected with wills, to legacies and codicils.

Of Legacies.

Legacies.

A legacy was defined to be a gift which the heir [3], by the direction of the testator, was bound to make to some person named for that purpose in the will. The following are some of the most material rules relating to legacies.

Things incorporeal, as debts due and the like, as well as corporeal, might be given as legacies [4].

If the same thing were given to two, either jointly or separately, and both lived to claim the legacy, it must be divided; but if one died, the other took the whole. When the testator aliened the thing given, the legatee might still claim the thing, or its value, unless the heir could shew that the testator aliened it with an intent to adeem or

[1] Inst. ii. 19. 5.
[2] Ibid. ii. 19. 6.
[3] Ibid. ii. 20. 1.
[4] Ibid. ii. 20. 12.

annul the legacy; but a pledge in no case operated as an ademption [1]. A legacy could not be given to an uncertain person, as to whoever should next be consul, after the death of the testator; but a legacy given to the poor, or to a city, or to a company, was good [2].

In process of time, it became necessary to put a limit to the amount of the legacies which the testator might give; for it was found, that unless sufficient were left to the heir to make it worth his while to accept the inheritance, no one would assume the office; it was ordained, therefore, by an imperial edict, and such was the law at the time of the irruption of the barbarians, that no testator should leave away from the heir in legacies more than three-fourths of his inheritance [3].

Of Codicils.

A testator, who had made a will, might give legacies by *codicil*, which did not require to be made with any of the solemnities which were essential to a will. And a person who made no will might give legacies, by codicil or by a simple letter, which legacies might be enforced against the heir as trusts; but the inheritance could not be disposed of by codicil [4]. Codicils.

[1] Inst. ii. 20. 21.
[2] Cod. Just. i. 3. 24.
[3] Inst. ii. tit. 22.
[4] Ibid. ii. 25. 1. 2.

OF SUCCESSION ON INTESTACY.

The second method mentioned by Justinian of acquiring the entirety of an inheritance is by succession to an intestate.

A person was said to be intestate who made no will, or who made a will which was revoked, or made void [1].

Succession of descendants.

The first order of successors to an intestate were his *descendants.*

On the death of an intestate who left children, the inheritance passed to his children natural and adopted, and grandchildren, or other descendants of the male line, who were called *sui*, or *necessarii hæredes* [2]; and where a son had died in the lifetime of the intestate, leaving children, such children were entitled to take their parent's share [3].

By the strict civil law, an emancipated child had no rights in the succession; but the prætors assumed the jurisdiction of admitting emancipated children to the *possession of the effects* [4] of their parent, giving them in effect the same benefits as children in the power of the parent, though they

[1] Inst. iii. 1. 0.

[2] Ibid. iii. 1. 2.

[3] Ibid. iii. 1. 6.

[4] Not declaring that they had any *right of property.* It was by these verbal distinctions that the prætors sought to avoid the appearance of legislating, when they were in fact making fundamental alterations in the law.

could not strictly take their shares in ownership. This right was confirmed by the perpetual edict [1]; indeed, by the prætorian law, emancipated children were placed, for all beneficial purposes, on the same footing, in regard to the inheritance, as children remaining in the power of the parent [2]. By the ancient law, the descendants of children of the female line were not admitted to succeed with descendants of the male line, as they might become part of another family: but this distinction between children of the male and female line was abolished by the constitutions of Valentinian, Theodosius, and Arcadius [3].

Succession of collaterals.

In default of own heirs, or those whom the prætorian law or imperial constitutions put on the same footing, by the civil law the nearest collateral relations of the male sex, on the father's side, or *agnates*, took the succession: thus the brothers, by the same father, whether by the same or different mothers, and in default of brothers, uncles and sons of brothers, and so on [4]. But by the prætorian law, and the constitutions of successive emperors, females were gradually let in, in this branch also, to share the succession with the males of equal degree [5]. The mother was admitted to take a share in the succession

Of agnates.

[1] Inst. iii. 1. 9.
[2] Ibid. iii. 1. 12.
[3] Ibid. iii. 1. 10.
[4] Ibid. iii. 2. 1.
[5] Ibid. iii. tit. 2. 3. "locus verbosus," as Vinnius observes.

of her children by a decree of the senate, passed in the time of Claudius [1].

Of the cognati.

The relations on the mother's side, or *cognati*, had no claim to the succession by the civil law; but, by the prætorian law, in default of agnati, the cognati were let into *the possession of* the inheritance [2].

The husband succeeded to the wife, and the wife to the husband, to the exclusion of the crown, where such husband or wife died without relations [3].

ACQUISITION OF AN ENTIRE ESTATE BY ADROGATION.

Adrogation.

A person of full age and *sui juris*, might cause himself to be adopted by another, together with his entire property: this mode of acquiring an entire succession, which was founded altogether on ancient custom, was called *adrogation*; the adopter, as he took all the property of the person adopted, became liable for all his engagements [4].

ACQUISITION OF THE ENTIRE ESTATE OF A DEFAULTER, OR INSOLVENT

Another mode of acquiring the entire possessions of another, so as to become his representative, was

[1] Ibid. iii. 3. 0.
[2] Dig. xxxviii. 8. Inst. iii. 5.
[3] Domat. i. p. 687.
[4] Inst. iii. 11. 1.

the following [1]: When a defendant was summoned to appear in court, and he absconded, or made default, his creditors might apply to the Judge to have some person appointed to sell the property of such defaulter, which, if he persisted in his refusal to appear, was granted, and, after thirty days, his property was put up for sale, on this condition, (which was publicly proclaimed) that he who became the purchaser should pay one moiety of the debts of the defaulter. Whoever became the purchaser, was, to all intents and purposes, the representative of the defaulter, being invested with all his rights, and liable to one moiety of all his obligations [2]. Thus the law remained until the time of Justinian, who directed that the creditors might dispose of the goods of their debtor, making default, either altogether or in portions, and in such manner as they thought most beneficial, and receive and divide the proceeds, and that the purchasers should only be liable to pay the price of the goods they purchased.

SECTION III.—OF OBLIGATIONS.

Having mentioned the several modes by which property in things might be acquired, I proceed to the third class of the Roman laws, namely, those which related to the rights which individuals might

[1] Rosinus de Judiciis, c. 12. p. 671.

[2] Inst. iii. 13.

acquire in respect of their transactions with others, and the claims which might arise from the conduct of one individual toward another; or, in other words, the laws which related to the several contracts and obligations, which might be enforced by proceedings at law.

Obligations. An obligation was defined to be, the bond by which a man was constrained to make some payment or to perform some act, according to the law of the state [1].

Civil. Obligations were either *civil*, that is, having their origin in some law established by enactment,

Prætorian. or adopted by general consent: or *prætorian*, that is, arising from the jurisdiction assumed by the prætors.

Classes of obligations. These obligations were of four classes:

1. Those arising from express contracts.
2. Those arising from implied contracts.
3. Those arising from actual wrongs; and,
4. Those arising from constructive wrongs.

Express contracts. Of obligations arising from express contracts there were four kinds:

1. Real contracts.
2. Contracts arising from words.
3. Where the terms were evidenced by writing.
4. Contracts arising from consent alone.

[1] Inst. iii. 14. pr.

A contract was said to be *real* when, in addition to the mutual consent of the parties, a thing passed from the one to the other. The contracts of *mutuum*, *commodatum*, and *depositum* were of this nature. I. Real contracts.

The contract of *mutuum* arose from the loan of money, or any other thing capable of being weighed, numbered, or measured: the money or other thing lent became the property of the borrower, who was bound to return something of the same kind, as money for money, wine for wine, and the like. If the borrower did not make the return at the time agreed upon, the lender might resort to a strict legal action, called *certi condictio*, to enforce the fulfilment of the contract [1]. Mutuum.

The gratuitous loan of a thing to another, for a certain time, was denominated *commodatum*. The borrower contracted an obligation to return the thing itself, at the end of the time fixed; and, if the thing lent were lost by fraud, or even from the slightest degree of negligence, the borrower was bound to replace it; but he was not liable for loss occasioned by force or violence [2]. Commodatum.

Where a thing was deposited with another, to be kept by him gratuitously, the contract of *depositum* arose, under which the depositary was bound to return the thing deposited, when required so Depositum.

[1] Inst. iii. 15. 2. Dig. xii. 1. 1, 2.

[2] Inst. iii. 15. 2. Dig. xiii. 6. 5.

to do. If the thing deposited were lost or injured by fraud, the depositary was answerable for it; but he was not answerable for negligence, unless of a gross nature: if, therefore, the thing deposited were lost or stolen, even from want of proper care, the depositary was not liable to replace it [1].

Where a thing was *pledged* or deposited with another to secure a debt, the obligation to return it was created; but here, as the pledge was given for the benefit of both parties, the person accepting the pledge was bound to exert diligence in preserving it [2], and might be compelled to make good the pledge which he had lost, from not giving due care to its preservation.

II. Obligations founded on words alone.

Obligations of the second class were contracted by the form of an interrogation being put by the one party, and an answer being given by the other.

Stipulations.

These obligations were denominated *Stipulations;* and were enforced by an action called *condictio certi,* if any particular thing were the subject of the stipulation, or *ex stipulatu,* if the matter of the stipulation were not any certain thing [3]. The ceremony of interrogation and answer, which was much in use amongst the Romans, was introduced, as the means of protecting against mistakes as to the meaning of the parties. A mere promise, given without an interrogation, was considered as *nudum*

[1] Inst. iii. 15. 3. Dig. xvi. 3. 1. and 32.

[2] Inst. iii. 15. 4.

[3] Ibid. iii. 16. pr.

pactum, and was not binding. Conditions might be annexed to such stipulations[1], and the rendering a certain thing, or doing a certain act, might equally be the subject of stipulation. None but the parties to the stipulation could take advantage of or enforce it. If any mistake were proved to have existed at the time of the contract, it vitiated in *equity* the whole transaction[2], though in *law* it was still binding. Nudum pactum.

Stipulations were mostly entered into by the voluntary act of the parties, in their ordinary transactions with each other[3]; but it was a common thing for the judges to compel litigating parties, in different stages of a cause, to enter into stipulations with each other, in the nature of recognizances, to do some act that justice required, and particularly to give security or indemnity, which stipulations were enforced in the same manner, and gave rise to the same rights and actions as ordinary stipulations.

The obligation of *suretyship* was a species of stipulation by which one or more persons became bound to pay the debt of another on his default, which obligation descended on the representative of the surety: each was bound in the whole amount, though as between themselves the sureties might compel the co-sureties to contribute[4]. Sti- Suretyship.

[1] Inst. iii. 16. 4.
[2] Ibid. iii. 20. 18.
[3] Ibid. iii. 21. 1 et seq.
[4] Ibid. iii. 20. 22.

pulations might be enforced as well by as against the representatives of a party dying [1].

III. Obligations evidenced by writing drawn up at the time.

There was this peculiarity in regard to obligations evidenced by writing, that if any one in writing admitted having received any money or other thing on loan, or admitted any other fact from which an obligation arose in law, he was held conclusively bound to such admission, unless he disproved the fact so admitted within two years, which was the utmost time allowed him to contradict such writing [2]; but the actions that arose on contracts in writing were the same as those which arose in mere words; and it is not easy to see why Justinian should have classed them under a distinct head.

IV. Obligations founded on mutual consent only.

The class of obligations founded on mere consent was very extensive, and embraced four distinct kinds of contract founded on mutual consent only, all of constant occurrence in the daily transactions of life. These were *sale* and *purchase*; *letting* and *hiring*; *partnership*; *agency*.

In these obligations, to the contracting of which the presence of the contracting parties was not essential, the one party was engaged to the other, to do or to render that which was just, (*ex bono et æquo*), which of course was determined by the law [3].

Sale and purchase.

A sale, and consequently the purchase, as already

[1] Inst. iii. 20. 24.
[2] Ibid. iii. 22. 0.
[3] Ibid. iii. 22. pr.

has been mentioned, was complete when the price was agreed upon, even before earnest was given; and from the time that such agreement was complete, the vendor was liable to an action to compel him to pay the price—the vendee to an action to compel him to deliver the thing sold; but if it was understood at the time that the agreement was to be reduced into writing, then until each party had signed the agreement, or it had been reduced into writing by a notary, there was *locus penitentiæ*, and neither party was bound[1]; so, from the moment the price was agreed on, unless where the agreement was to be reduced into writing, the thing sold was at the peril of the purchaser; and if the thing sold increased in value, such increase belonged to the purchaser, "*nam et commodum ejus esse debet cujus periculum est*[2];" though, before delivery the seller was still considered to be so far the owner, that it was competent to him to bring an action for recovery of the thing if stolen, or to obtain damages if it were injured[3].

Of letting and hiring.

In the same manner, as soon as the rent or return was agreed upon, the contract of *letting* and *hiring* was complete[4]. There was a species of letting to hire, known by the name of *emphyteusis*, which I have had occasion to mention in speaking

[1] Inst. iii. 24.
[2] Ibid. iii. 24. 3.
[3] Ibid.
[4] Ibid. iii. 25. pr.

of the patrimonial domains of the emperors. By this contract lands were let to a person, to be enjoyed by him and his representatives, at a certain rent. Land so let, unless some restriction were imposed, might be the subject of unlimited gift, sale[1], devise, and succession[2]; but it could not be sold without the option of purchasing[3] it being first given to the lord. Every person who took property to hire was bound to use the same care in the use and preservation of such property, as a prudent *pater familias* would be expected to bestow on his own property[4]; and the representative of the hirer was bound to the same obligation[5].

Partnership.

Partnerships were either general, that is, comprising all the business and transactions of the contracting parties, or special, as for the purchase and sale of some particular merchandize. In partnerships of both descriptions, if nothing were said as to the shares, the parties were considered to be entitled in equal shares; but the amount of the interest of each party might of course be the subject of agreement[6]. In general, any one of the parties might at pleasure put an end to the partnership; and the death of one of two or more partners operated *ipso facto* as a dissolution[7]. So where

[1] Inst. iii. 25. 3.
[2] Vinn. p. 688.
[3] Ibid. p. 689.
[4] Inst. iii. 25. 5.
[5] Ibid. iii. 25. 6.
[6] Ibid. iii. 26. 1.
[7] Ibid. iii. 26. 5. 6. 8. and 9.

the partnership was formed for any particular purpose, which failed, the partnership was considered as at an end. And if one of two or more partners, being unable to pay his debts, declared himself bankrupt, and gave up his property to be sold, for the benefit of his creditors, this operated as a dissolution. A partner could only require from his copartner the same diligence as he exercised in his own affairs [1].

Agency or mandate.

When one person committed to another gratuitously the execution of any business, and the commission was accepted, each party became mutually bound, the one to act strictly according to his instructions, the other to ratify what was done by the agent within the scope of his instructions [2]. Every mandate was revocable at pleasure [3]; and it was put an end to by the death of either party; but if the agent, not knowing of the death of his principal, did any act within his authority, the representative of the principal was bound by what was so done.

Obligations arising quasi ex contractu, or from implied contracts.

In the early years of the republic, the citizens were frequently absent from Rome, performing the duties of officers or soldiers in the armies; therefore it became necessary that their affairs should

[1] Inst. iii. 27. pr. 13. et comm.

[2] § 9 and 18.

[3] Inst. iii. 27. 10.

be managed in their absence by persons who would voluntarily engage in that duty; and unless the acts of such persons, though done without previous authority, had been confirmed, and such voluntary agents had been indemnified, the affairs of persons absent must have suffered serious injury from neglect. From these considerations it early became the established law, that if any person undertook the management of the affairs of another who was absent, a mutual obligation arose—the agent on the one side being bound to render a strict account, and the principal, on the other hand, being bound to indemnify the agent in respect of all his lawful acts. However, an agent of this description incurred a very heavy responsibility, for if any loss happened under his management, and it appeared that any other person better skilled than such voluntary agent could have prevented such loss, the agent was held liable [1]. The mutual obligation of guardian and ward [2], and the obligation of the representative of a testator to pay the legacies given by the will, were also classed under obligations arising *quasi ex contractu* [3].

[1] Inst. iii. 28. 1.
[2] Ibid. § 2.
[3] Ibid. § 5.

Of Satisfaction of Obligations arising from Contracts express or implied.

The modes of satisfying obligations are described by Justinian to be of four kinds: First, by payment[1]. Secondly, by acceptilation, which is thus explained:—If, in answer to a question put by the person bound, the obligee, or person to whom the obligation was made, admitted that the obligation had been satisfied, this operated as a release and extinguishment of the obligation; and such release could not be avoided excepting for fraud or mistake. Thirdly, by novation; thus, if a creditor took a new security for the payment of the same debt from another, this new contract, unless taken expressly by way of suretyship, destroyed the original obligation[2]. Lastly, all obligations might be dissolved by mutual consent.

Payment. Acceptilation. Novation. Consent.

Having stated the general doctrine in regard to obligations arising from contracts express and implied, I proceed, in the order of the Institutes, to describe the nature of the next general class of obligations; namely, those which arose from wrongs committed.

[1] Inst. iii. 30. pr.

[2] Ibid. iii. 30. 3. In Bracton, iii. c. 2. and Fleta, ii. 60. may be found, in regard to novation, one of the numerous instances of the adoption of the rules of the civil law, even in its very words, into the works of the ancient writers on the common law of England.

Obligations arising from wrongs.

The obligations arising from wrongs were of four classes, namely, those which arose from

Furtum, or theft;

Rapina, or robbery;

Damnum, or damage; and

Injuria, or injury committed [1].

Theft.

1. Theft was defined to be a wrongful secret detraction of another's property, with a view to gain. To constitute theft, it must appear that the taking was with intent to steal [2]. He who concealed stolen goods was liable to the same action at the suit of the loser as the thief himself; so he who assisted in the theft, as the person who, with a red flag, a common contrivance it would seem, frightened cattle from their pasture that another might steal them, was held to be a principal in the theft, but he who gave advice only was not liable to an action of theft [3].

Any one might bring an action of theft who had an interest that the thing should not have been stolen, even though not the owner; and the owner could not bring such action unless he had such an interest: thus, if goods [4] sent to a dyer were stolen, the dyer, not the owner, was entitled to bring the action of theft; the owner having an action against

[1] Inst. iv. 1. pr.
[2] Ibid. iv. 1. 1. and 7.
[3] Ibid. § 11.
[4] Ibid. iv. 1. 13.

the dyer, on his implied contract to return the goods to him. If, however, the dyer were insolvent, the owner, having then an interest, might bring an action of theft.

By the ancient law, the nightly thief was punished with death[1]; but the severity of the law was gradually relaxed by the prætors, and at length fourfold restitution was the severest penalty inflicted on the thief, who, when he abstained from violence and riot, was never considered as a criminal[2].

Robbery.

2. *Rapina*, or robbery, was defined to be theft committed with violence or riot. The same remedy, of fourfold restitution, was given to the person who lost his property by this species of theft, and it was also punished as a public crime[3].

Damage.

3. Damnum, or involuntary damage. He who, from want of due care, injured the property of another, was bound to make good to the owner the damage which he occasioned[4]; but no one was bound to answer for any damage done by mere accident, and in the performance of a lawful act. Thus, if a soldier, in practising with his javelin, killed the slave of another, if it was in the usual place for exercise, he was not liable to an action; but, if it were in a place not used for such exercises, he was

[1] Aul. Gell. xii. 18.
[2] Inst. iv. 1. 13.
[3] Ibid. iv. tit. 2.
[4] Ibid. iv. 3. pr.

liable to make good the loss and damage which he so occasioned [1]. The representative of the owner of the property injured might bring an action of this description, but it could not be brought against the representative of the person who occasioned the damage [2]. Where a slave was killed by the unlawful act of another, not only might the owner proceed by civil action, but also by criminal prosecution [3].

Injury.

4. The injuries which gave rise to civil actions were numerous. The following may serve as instances:—He who was maliciously maimed or beaten, or was calumniated by words spoken, or by a written libel, was entitled to bring an action against the perpetrator of the injury so committed. The female whose virtue was assailed was also entitled to bring an action for compensation. Originally the penalty for any bodily harm was retaliation, or the right to have the same injury inflicted on the perpetrator; but the prætors justly considered that such a revenge could give no substantial satisfaction to the sufferer; wherefore it was universally part of every prætorian edict that the person committing the injury should give a pecuniary compensation to the person injured. Under the perpetual edict, it became part of the uniform and settled law, that "*secundum gradum*

[1] Inst. iv. 3. 4.
[2] Ibid.
[3] Ibid. iv. 3. 9.

dignitatis[1]; *vitæ que honestatem crescit aut minuitur estimatio injuriæ.*" If the injury were accompanied by any peculiar circumstances of aggravation or indignity: thus, if a person were insulted or struck in the theatre, forum, or other public place[2], the person sustaining the injury was entitled to an increased compensation. It was at the option of the person against whom any injury was committed, to proceed civilly or criminally[3]. Not only he who perpetrated the injury, but he who counselled it, was liable to an action[4]; and the amount of the compensation was always estimated by certain persons called *recuperatores*, who were appointed for this purpose by the proconsul at the instance of the complainant[5]. In an action brought for recovery of damages, on the ground of injury sustained, it was necessary to show that the act had been done maliciously; this action, therefore, would not lie when the act was done in jest[6]. It may be remarked that, in an action for a libel, it was no defence that the matter complained of was true, unless the defendant could shew that the public were interested in the exposure[7].

[1] The Barbarians took this principle as the basis of their enactments on the subject of injuries.

[2] Inst. iv. 4. 9.

[3] Ibid. iv. 4. 10

[4] Ibid. iv. 4. 11

[5] Ibid. § 7.

[6] Dig. xlvii. 10. 8.

[7] Ibid. xlviii. 19. 24.

Obligations arising quasi ex delicto, or from constructive wrongs.

There were certain acts which, though not of such a character as to be classed under the description of wrongs, yet were of such a nature as to give rise to an obligation to make compensation to the person injured by the act. Thus: if a judge gave a wrong judgment from unskilfulness or ignorance, or if a person, without any evil intention, by suspending or throwing any thing from his house, caused any personal injury to another, he was liable to an action for compensation, at the suit of the party injured [1].

In the above general outline of the civil laws of the Romans, I have principally confined myself to the rights which had their foundation on the ancient laws. But there were some rights which had their origin in equitable principles merely: such were those which depended on the doctrine in regard to trusts, or *fidei commissa*, and in regard to *restitutiones in integrum*, which I shall have occasion to explain in a future page. So, under the perpetual edict, many grounds of defence were given which were founded on equitable principles merely: such were those which were given in cases of fraud, accident, and mistake.

[1] Inst. iv. 5. 1.

The rights and remedies which had their origin merely in equitable principles were administered by the proconsul as well as the prætor, in a different character from that in which he administered the system of jurisprudence which was founded on the laws; the mode of obtaining the benefit of such remedies was also different. The rights and remedies which were founded on the laws might be enforced before the proconsul under his ordinary jurisdiction; those which were founded on equitable principles merely, could only be enforced under his extraordinary jurisdiction. The proceedings in regard to legal rights were conducted by means of actions, exceptions, and other pleadings, according to the forms prescribed by law; in those which related to equitable remedies, the machinery of legal formulæ was not employed.

The rights above adverted to, which had their foundation in principles of equity merely, will be more particularly noticed when I come to speak of the extraordinary jurisdiction of the proconsul, where I shall take occasion to notice, more at large, the distinction between the ordinary and extraordinary jurisdiction. I proceed at present to the fourth division of the subject now under consideration, namely, the doctrine of actions and defences to actions.

SECTION IV.—OF ACTIONS AND DEFENCES TO ACTIONS.

An action was defined to be the right which a person had of demanding, in a course of justice, that which was his own, or which he had a right by law to claim. This general rule was applicable to every action, that it must be commenced in the province in which the defendant was domiciled.[1]

Different classes of actions.

Actions were of various descriptions. In regard to *their object*, they were of three kinds, personal, real, and mixed.

Personal.

1. A *personal action*, or *condiction*, was an action by which one man proceeded against another, to obtain satisfaction in respect of some obligation to which such person was liable, but which action had not for its object the recovery of any particular thing.

Real.

2. *A real action*, or *vindication*, was an action brought against the defendant with a view to recover some particular thing from the defendant, or in case it were not restored, to have the defendant condemned to pay the demandant the amount of the damage sustained by his being deprived of the thing claimed[2]. Though rights to servitudes upon the land of another could not properly be called things, yet as they partook of realty, actions for the enforcing such rights were

[1] Cod. Theod. ii. l. 4. [2] Inst. iv. 6. 1. Vinn, 786.

classed as real actions [1]. 3. *Mixed actions*, as their name denoted, were partly real and partly personal. Of this description were actions brought for the division of an inheritance between co-heirs, or a partition of a thing held in common, and for settling boundaries; in each of which the judge not only made the division, or settled the boundary, but also, when he saw occasion, caused the one party to pay to the other a certain sum by way of compensation, or for equality of partition [2]. Indeed it was competent to the judge or arbitrator, in actions, brought for a partition of property where it was incapable of division, to assign the whole to one, and to adjudge that such one should pay to the other the just value of his share. Mixed.

Actions both real and personal, in regard to *their origin*, were of two kinds, *civil or direct*, and *prætorian*. Civil or direct actions were such as were given by some law, senatus consult, or imperial constitution, or by long established custom; *prætorian* were such as were given by the perpetual edict, and flowed from the jurisdiction which the prætors had assumed of extending the remedies given by the laws. Thus, in *real actions*, or condictions, by the civil or common law he alone who could prove himself to be absolute owner of a farm could recover it by action from the Civil. Prætorian.

[1] Inst. iv. 6. 2.

[2] Ibid. iv. 6. 20. Ibid. tit. 17. § 5. and 6.

wrongful possessor; so that, if a person were not clothed with the absolute ownership (which was the case with a purchaser before conveyance, and with the person who was entitled to property only by right of emphyteusis, or perpetual lease) he could not proceed by civil action for recovery of a farm to which he had a title. To remedy this defect, the prætor Publicius invented a mode of proceeding of this description,—the claimant was permitted to state, in his writ or libel, that he had gained a title to the thing in question by prescription, which *legal fiction* the possessor was not allowed to dispute, but was put to defend his possession on the question of right [1]. A prætorian real action, of a like nature, was given to creditors for recovery of property conveyed away by their debtor, with a view to defraud them; thus, after the creditors of an insolvent had, in due course of law, obtained the ordinary judgment which they were entitled to for the giving up to them by the debtor of the whole of his goods, they were permitted to bring an action against the person who had so obtained the property, stating in their libel that the thing in question had not been delivered to him by the debtor, and which the possessor was not permitted to dispute [2]. So, in *personal actions* [3], no one could, by a direct civil action, recover money from another on a con-

[1] Inst. iv. 6. 4.
[2] Ibid. iv. 6. 6.
[3] Ibid. iv. 6. 9.

tract unless a stipulation had intervened; but where a contract had *in fact* been concluded, the prætors, early in the history of Roman jurisprudence, gave, in such cases, an action *on the case*, in the *nature of* a civil action of condiction against the party who broke his engagement. Other similar actions on the case were given by the prætors under their ordinary jurisdiction[1]. When a defendant had, according to the form which I shall presently describe, put the plaintiff to his oath that the debt claimed by him was due, or the thing demanded belonged to him, and the plaintiff took the oath required, the plaintiff was entitled to a special prætorian action, in which the only fact allowed to be disputed was, whether the plaintiff had taken the requisite oath; numerous prætorian actions of a similar nature were given by the perpetual edict.

Prætorian actions in the case.

Special prætorian actions.

From the time that the formulæ became public, a party might, on application to the prætor or pro-

[1] Inst. iv. 6. 11. Vinn, p. 806. "Quia actionum non plenus numerus esset, ideo plerumque actiones *in factum* (on the case) desiderantur. Sed et eas actiones quæ legibus proditæ sunt si lex justa ac necessaria sit supplet prætor in eo quod legi deest: quod facit legi aquiliæ reddendo actiones in factum *accommodatas legi aquiliæ*," &c. Dig. xix. 5. 11. So "equity will give a man a special action suited to his case when he cannot have the general action as an action of debt." 8 Co. Rep. 147. *a*.

consul, obtain, *as of course*[1], the formula of action which he conceived to be suited to his case; but in regard to some prætorian actions, the party was bound to make out a case to the satisfaction of the prætor or proconsul, before he was allowed to sue out his writ[2].

Utiles actions.

Besides the express actions given by the laws and prætorian edicts, in which the words of the law or edict were strictly followed, it appears that analogous forms of action were from time to time introduced by the jurisconsults. These forms, drawn up in terms corresponding with those of the express civil and prætorian actions on which they were founded, were adapted to provide a remedy for cases which were within the spirit of the law, or of the edict, but not within its letter, and were classed with the express civil or prætorian actions from which they had their rise. I conceive that these were the actions called *utiles aciones*[3].

General actions on the case.

In the complexity of the dealings between man and man, there naturally arose unforeseen circumstances, which gave, according to the spirit of

[1] See Tidd's Practice, 97. as to writs *de cursu*.

[2] Dig. iv. 1. 14. 1. ibid. xxix. 4. 6. 3. Cod. Just. ii. 21. 2. According to Fleta, ii. c. 13. § 1. the Chancellor of England anciently exercised the same discretion in the granting of original writs.

[3] Vinn, 760, et v. Dig. xiv. 3. 19. xxi. 2. 39. ib. xi. 7. 7. § 1. et 14. § 11. &c. "Quotiens deficit actio vel exceptio *utilis* actio vel exceptio est." xix. 5. 21.

the law, a clear demand, but which could not be brought within any of the forms of action given by the law or prætorian edicts, or settled by the jurisconsults. To provide for such cases, a new and comprehensive class of actions was at length introduced, called *general actions on the case*; in which the plaintiff was allowed to detail the facts of his case, and to claim such legal remedy or redress as, on such statement, he should appear to be entitled to [1].

Actions stricti juris, and bonæ fidei.

There was another distinction made in the different kinds of actions, arising from the nature of the *subject matter* of the action. Thus some were called *stricti juris*, others *bonæ fidei*: actions founded on the contract of stipulation were of the former class; and in actions of this description, the plaintiff could recover nothing but the very subject of the stipulation, and unless he proved his case exactly as stated in his formula, he lost his cause. In actions *bonæ fidei*, such as on sale and purchase, letting and hiring, of pledge, partition, and many others which are enumerated by Justinian [2], greater latitude was given; and in such actions the judge to whom the trial of the cause was delegated was charged, in case he should find that the defendant had entered into the contract where the action was in contract, or held in com-

[1] Heinnec. Elem. Jur. Civil. § mclxiv. Vinn, p. 760.

[2] Inst. iv. tit. 6. § 28.

mon with the plaintiff, when the action was for a partition, to adjudge that the defendant should give or render to the plaintiff what in good faith he should consider was due or ought to be rendered; and when justice required it, he was charged to condemn the plaintiff to make some reciprocal compensation to the defendant [1].

Arbitrary actions.

Actions which had for their object the obtaining possession of a thing claimed, or a compensation for its value, which was the case in all mixed actions which I have above described, were called *arbitrary actions*. In such actions the judge was charged first to inquire whether the defendant was liable to the demand made, and to pronounce upon it accordingly; and in case the defendant did not comply with such demand to the satisfaction of the judge, then the judge was charged to cause an estimate to be made of the damage which the plaintiff had sustained by reason of such noncompliance, either by the oath of the plaintiff or otherwise, as he should see fit, and to condemn the defendant in that amount [2]. There were other distinctions in regard to actions, but not of sufficient importance to require particular notice.

Precautions against Vexatious Litigation.

By the ancient law, every precaution was taken to prevent vexatious or improper litigation. Thus

[1] Inst. iv. 6. 28 and 30, § 39.

[2] Ibid. iv. 6. 31. Heinnec. Elem. Jur. Civil. § mclxxxv.

the plaintiff, on commencing an action, was bound to swear that he did not commence his suit with a view to calumniate or harass the defendant, but because he believed that he had a good cause of action[1]; and in case the plaintiff failed in his suit, he was subject to an action for recovery of one-tenth of the amount or estimated value of the matter in dispute: so it was competent to either of the parties in a real action, to call upon his adversary to stake a sum of money, or to become bound in a certain amount, to be paid to the party gaining the cause; and if either party refused, in the one case to stake the money, or in the other to join in the wager, judgment was given against him[2]. The sponsio or wager in a real action was made in the following manner:—The demandant, in the presence of the proconsul, thus addressed the possessor: "Quando negas hunc fundum (vel servum) meum esse, sacramento te quinquagenario te provoco, spondesne quingentos si meus sit?" to which the defendant answered, "Spondeo si tuus sit;" and added, if he chose, "et tu spondesne quingentos ni tuus sit?" to which the demandant must then reply, "Spondeo." The party who gained the cause was entitled to recover, by a civil action, the amount so stipulated to be paid[3].

Sponsiones, or wagers on the event of actions.

[1] Inst. iv. 16. 1.

[2] Ibid. et not. and see Rosinus, p. 672, and Sigonius.

[3] Rosinus, ubi supra.

Of the Limitation and Survivorship of Actions.

By the ancient law, there was no limitation of time beyond which legal actions might not be brought; but as to prætorian actions, generally speaking they could not be brought unless within the year during which the prætor who gave them presided; for being founded solely on the edict of the prætor, whose office and authority only endured for that period, of course unless the same action were given by the successor, there would be no authority for bringing the action: various limitations were introduced by the emperors.

By the imperial constitutions, generally speaking, in all actions for the enforcing of civil rights, whether legal or prætorian, a person was bound to bring his action within thirty years from the time when his right accrued. The same term was allowed in legal actions arising from wrongs; but prætorian actions arising from wrongs could not be prosecuted after a year from the time the right of action accrued [1].

The right of action which was given by law was liable to be varied by the deaths of the parties. Some actions survived in favour of the representatives; such were all actions which had for their object the recovery of any *thing*: others survived to the representatives of the plaintiff, but could not be prosecuted against the representatives of the de-

[1] Heinnec. Elem. Jur. Civil. mcclxv.

fendant; such were actions of theft: but the right of action for slander and the like was extinguished by the death of either party, unless at the time of the death the action had been commenced, and was in a state for trial; for then the action survived to the representatives of the plaintiff, and might be prosecuted against the representatives of the defendant [1].

Attorneys.

It was competent to the plaintiff and the defendant in a suit to appear by attorney; and for this a verbal appointment was sufficient warrant. In the latter ages of the empire, companies of attorneys, or persons who made it their business to conduct civil proceedings, appear to have been formed and recognized by the law [2]. I proceed to describe the form in which civil proceedings were conducted before the proconsul in his ordinary jurisdiction.

FORM OF PROCEEDING BEFORE THE ORDINARY JURISDICTION OF THE PROCONSUL.

All judicial proceedings which took place before the proconsul were transacted before him sitting in open court [3], in the forum, or in the mansion appointed for the purpose, and his sittings were held at regular stated times.

[1] Inst. iv. 12. 1. Simil. Bracton. 114. b.

[2] Cod. Theod. viii. 9. 1.

[3] "Apertis secretarii foribus intro vocatis omnibus." Cod. Theod. i. 7. 2. a law of Valentinian.

Ordinary jurisdiction of the proconsul.

The ordinary jurisdiction of the proconsul was similar to that which was exercised by the consuls before the creation of prætors, and the proconsul under this jurisdiction held cognizance of all actions, both civil and prætorian.

The proconsul, in his ordinary jurisdiction, himself decided all questions of practice, of pleading, and of law; but before the alterations introduced by Diocletian, which I shall hereafter notice, questions of fact might be and commonly were referred by the proconsul to the decision of judges appointed for that purpose, in the manner after stated.

The common mode of proceeding in matters which came before the ordinary jurisdiction of the proconsul [1], which continued down to the time of Diocletian, and afterwards with such variations as will be noticed, down to the time of the destruction of the western empire, appears to have been as follows. The plaintiff first notified to his adversary the nature of his complaint, and summoned him to appear before the proconsul. In case the defendant refused to appear, force might be employed by the plaintiff to compel his appearance; for until the defendant appeared, the proconsul had no jurisdiction; however no one could be

Of summoning the defendant to appear.

[1] What is here said of the proconsul applies to all *præsides, moderatores*, and other governors. I use this word alone to avoid repetition.

taken from his house, which was considered to be his castle[1]; but if any one fraudulently lurked about, or concealed himself to avoid being brought into court, the proconsul, under the authority of the perpetual edict, might, on the application of the plaintiff, cause the goods of the defendant to be seized, in order to compel his appearance; and in case the defendant did not appear within a certain number of days, the proconsul, as before has been adverted to, might order his goods to be sold, for the benefit of the plaintiff and his other creditors[2]. According to the ancient form of proceeding, when the plaintiff had brought the defendant before the proconsul, the plaintiff or his counsel applied to the proconsul for liberty to use a formula of action suited to his cause of action, and a copy of a formula taken from the registry kept for the purpose was delivered to the party applying, by the proconsul; if, therefore, the complaint were not suited to any of the formulæ in the register, no action could be instituted. In the days of Cicero, at which time many of the nu-

Application for formula.

[1] "Plerique putaverunt nullum de domo sua in jus vocari licere quia *domus tutissimum cuique refugium ac receptaculum sit*, eumque qui inde in jus vocaret, vim inferre videri." Dig. ii. 4. 18 and 22. A maxim which has been adopted in the law of England.

[2] "Qui fraudationis causa *latitaverit*, (a word which has given a name to our writ of *latitat*) si boni viri arbitratu non defendetur, ejus bona possederi vendique jubebo." Edict. perpet.

merous prætorian forms of actions which I have before mentioned, had been introduced, the plaintiff was left to choose his own formula, which was no longer delivered out by the prætor or proconsul; and it was a most material part of the duty of the advocate of the plaintiff to choose a proper formula, for unless he chose one adapted to the cause of action, the plaintiff failed in his suit [1]. From the time that the plaintiff was at liberty to use any formula at his discretion, particular persons were attached to the court of the prætor at Rome, and the proconsul in the provinces, who made it their business to assist the advocates in choosing from the register of the proconsul, or in drawing up, for the use of the litigating parties, the formulæ of actions, and exceptions, and other pleadings which were suited to their case.

Commencement of the suit.

The plaintiff or his attorney, who, if the principal were present was called *cognitor*, if absent *procurator* [2], was bound to dictate to the defendant, or to deliver to him a copy of the formula, or *libellus actionis* [3], on which he meant to proceed; and he was bound, at the same time, to exhibit any

[1] See Rosinus de Intentione Actionis, p. 672 et seq. and Sigonius, de Antiq. Jure Provinciarum, and de Judiciis. I have not thought it necessary to make continued references to the chapters of Sigonius, as the part referred to may always be immediately found on looking to the titles of the chapters.

[2] Cod. Theod. ii. 12. 1. and 7.

[3] Cod. Just. iii. tit. 9. Heinnec. ad Pandect. xiii. § 334. et seq.

written proofs he might have to support his demand [1]. The defendant then demanded an advocate to be assigned to him, of whom there were a certain number attached to each tribunal [2]; and in case the plaintiff sued by an attorney, the defendant might require that the attorney should find sureties that his principal would ratify his acts [3]. This done, the plaintiff required that the defendant, unless he were a landed proprietor [4], should find sureties (*vades*) for his appearance in court on a certain day, which was originally the third day from that time [5], but was afterwards extended to a much longer period, and until which time the matter was adjourned, that, if practicable, the parties might agree [6]; if, however, they could not come to any accommodation, the defendant, unless detained by disease, *morbus sonticus* [7], or any inevitable hindrance, was bound to appear in person, or by his attorney, before the proconsul or

[1] Ibid. § 339. So, in an action of debt or covenant with us, the plaintiff states, "one part of which deed the plaintiff brings into court."

[2] Cod. Theod. De Decurionibus, l. 152. I have followed Sigonius and Rosinus, in detailing the several acts done in the progress of a cause.

[3] Inst. iv. 2. 1.

[4] Dig. ii. 8. 15.

[5] Rosinus, p. 672. The references in Adam's Roman Antiquities are so very erroneous, that it is hardly possible to make any use of what might otherwise have been a most valuable help.

[6] Or as our legal expression is, that the parties might *imparle*. Et v. Cod. Just. iii. tit. 9.

[7] Dig. xlii. 1. 60, &c. from whence the word "*essoine*."

his lieutenant, at the appointed time. If, on the appointed day, the defendant made default, the plaintiff might proceed against his sureties, and also cause the goods of the defendant to be sold in the same manner as in default of appearance on the first summons; but down to the time of Justin the First, no cause could be heard when the defendant made default. If the defendant appeared, he was bound, in all real actions, to find sureties for keeping the thing demanded without injury pending the litigation; and, in personal actions, if the defendant appeared by attorney, such attorney was required to find sureties that the defendant would abide by the judgment in the action [1]. The defendant having thus appeared, put in his defence, which he did in writing, according to the forms I am about to describe; and this commenced what was called the *contestatio litis* [2].

Contestatio litis.

The pleadings.

The action was met, in the first place, by an exception. Exceptions, like actions, were of two kinds, legal, that is, founding their conclusion on some law enactment or custom; or prætorian, that is, founding themselves on the perpetual edict, or on general principles of equity.

Exceptions.

An exception, in its most extended sense, was an allegation on the part of the defendant, of

[1] Inst. iv. 11. 1. Heinnec. ad Pandect.

[2] Cod. Just. iii. 9. 1.

some matter which, if true, would have the effect, either in law or in equity, of avoiding the plaintiff's demand; in its strict or more technical sense, an exception was a mode of defence somewhat resembling what in our courts of equity is called a plea, and by which the facts stated by the plaintiff were admitted in whole or in part, but the legal conclusion resulting from them was rebutted or avoided by the statement of some other fact, which, if true, would show that the plaintiff was not entitled to what he claimed from the defendant. Of this description were exceptions founded on fraud or mistake. Thus if a man entered into a solemn stipulation, he was bound by it at law, whatever fraud might have been practised upon him; but on an action brought on such stipulation, the defendant might plead the fraud or error, which, if proved, was a sufficient answer to the action. Exceptions, however, of this description, were addressed to the extraordinary jurisdiction of the proconsul, which will be presently noticed; and on such a defence being put in, all proceedings at law or before the ordinary jurisdiction, were stayed at once, without the necessity even of an application for an injunction or order for the purpose. The exception of a judgment given on the same matter was also of this nature[1]. As actions on the case might be made up of many facts tending to one point or

[1] Inst. iv. 13. 5.

legal conclusion, so might exceptions; and such exceptions were denominated, in the same manner, exceptions on the case [1].

Replications, &c.

But, as the action might be avoided by bringing forward some new fact which *prima facie* avoided the action, the exception might also be avoided by the statement of some new fact by way of *replication* on the part of the plaintiff; and the fact so introduced by the replication might be met by the defendant by means of a *duplication*, and the parties might go on to a *triplication*, *quadruplication*, and so on, until no new fact remained to be brought forward [2], and the real question of law or of fact on which the action turned was presented to the proconsul for decision.

Abuses of the science of pleading.

In the pleadings on actions founded on *the civil law*, there were certain strict technical rules which it was necessary to observe, and which were perverted, even in the days of Cicero, by the crafty and dishonest portion of mankind, to the most iniquitous purposes. The pleader was obliged to direct his attention to the most minute and trifling accuracies of expression and of language, which, if neglected, vitiated the pleading, and prevented the cause being heard on its real merits,—to the complete subversion of all justice, and to the utter disgrace of the law as a liberal science [3]. It was not

[1] Ibid. iv. 13. 1. Vinn. p. 867.

[2] Inst. iv. tit. 14.

[3] Cicero, speaking of the science of pleading in his time, says, "Dignitas in tam tenui

until a very advanced period, as I shall have occasion to notice, and when, from the enormous abuses that prevailed in every department of the state, reform in legal proceedings had become nugatory, that the strict rules which were found to stand in the way of the decision of the real merits in civil actions were abolished [1].

The hearing.

If the pleadings could be continued free from technical objection until the real point to be determined was properly raised, and it appeared to be a *question of law*, the opinion of the proconsul was at once taken upon the point as it was presented to him on the pleadings. If the question were one of fact, and not of law, the next step was to put such question in a course for decision. If the parties could agree upon an indifferent person, "*vir bonus*," as arbitrator, to whom the matter in dispute should be referred, the proconsul appointed him as of course; but no one could be compelled to refer his cause to an arbitrator [2]. Unless, therefore,

Decision by arbitration.

scientia quæ potest esse, res enim sunt parvæ, prope in litteris atque interpunctionibus verborum occupatæ." Oratio pro Muræna. Many similar passages will occur to the recollection of the classical reader.

[1] The reader may see the mode in which pleadings were conducted before the Roman prætor clearly stated in a note to pp. 5 and 6 of the 1st vol. of Mr. Starkie's excellent Treatise on Evidence.

[2] "Arbiter est," says Festus, "qui totius rei arbitrium habet et potestatem" "nemi-

such agreement were come to, the plaintiff demanded of the proconsul either to hear the cause, or to appoint one or more judges to give judgment between him and the defendant.

Originally the proconsul was at liberty to decide whether he would himself hear and determine the cause, or refer it to delegated judges; and it appears to have been discretionary with him as to whom, from amongst the provincials assembled at the *conventus*[1], or general assembly, he should appoint to this office, which no one when appointed could refuse to undertake. However, either party, before the hearing, might peremptorily challenge the judges appointed by the proconsul, and have others substituted in their place; but no one could challenge the judge who had been substituted on his peremptory challenge, unless for very sufficient cause. It was competent, also, to either of the litigating parties to require another

nem prætor cogit arbitrium recipere? quoniam hæc res libera ac soluta est." Dig. iv. tit. 6. Horace refers to the office of arbitrator in his well known lines "vir bonus est quis," &c. No oath was administered to an arbitrator.

[1] Cicero, amongst his other accusations against Verres, charges him with having refused to appoint judges from the body of the provincials assembled at the *conventus*: thus he complains, "nullum unquam *judicem* vel *recuperatorem* dedit;" and again, "selecti *e conventu* aut propositi ex negociatoribus *judices* nulli." Other similar passages are quoted by Sigonius.

judge to be added to those appointed by the proconsul [1].

Trial by delegated judges.

The judge, or judges, being finally appointed, an oath was administered to them to decide according to law, though to arbitrators no oath was administered. The proconsul then delivered to the judges a charge, in which he informed them what was the question they had to try, and what was the judgment which, according to law, they were to pronounce, in case they should find the facts to be as stated by the one party or by the other; and it would appear that, in some cases, the proconsul pointed out to the delegated judges the nature of the evidence, and number of witnesses which they were to require. Here in general the interference of the proconsul, as regards the trial, terminated: what was done down to this period was said fieri *in jure*, what followed fieri *in judicio*.

"The judges having met at some place selected by themselves, heard the advocates of the parties and their witnesses, and other evidence, and then

[1] Cod. Just. iii. 1. 16. "Apertissimi juris est licere litigatoribus judices delegatos antequam lis inchoetur recusare." Ibid. tit. 9. et v. Novell. Just. liii. c. 3. During the republic, it appears to have been the practice for the proconsul to appoint *three recuperatores*, or one judge, at his option, such judge taking a jurisconsult as his assessor; but this practice became antiquated in the time of the emperors. See Sigonius de Antiq. Jure Provin. p. 290.

gave judgment between the parties, in the form prescribed in the charge of the proconsul. If the question were one of difficulty, or involved any question of law, the deputed judges might and usually did take to themselves as assessor or assistant a jurisconsult, or person skilled in the law; so if it involved any question of science or art, the judges might select some persons conversant with the subject to assist them in forming their judgment: indeed the parties themselves might, in such case, require that a person should be appointed to assist the deputed judges [1]. If an even number of judges were appointed, and their opinions were divided, the cause was remitted to the proconsul for his decision; and in all cases, at least in later times, either party was at liberty to appeal to the proconsul from the decision of the deputed judges [2].

Assessors.

Of putting the decisory oath.

In most cases it was competent to the party on whom the burthen of proof was imposed, to put the decision of the question on the oath of his adversary [3]; which mode of decision was most commonly resorted to where the fact in dispute lay

[1] See Sigonius de Judic.

[2] Cod. Just. iii. 3. 3. a law of Diocletian. The mode of trial by delegated judges certainly continued down to the time of Valentinian and Valens, at least in causes of small amount. The delegated judges are occasionally called *arbitri*. Cod. Theod. i. 7. 1. xi. 30. 63. xi. 31. 3.

[3] The nature of the decisory oath of the Romans may be seen in the CODE NAPOLEON, art. 1358 et seq. where it is adopted.

within the personal knowledge of one of the parties: The form of the oath was at the discretion of the party requiring the oath to be taken, and the judge was bound to put it in the very words which the propounder chose to use. In case the party so put to his oath made such oath according to the form prescribed, as that he did not owe the debt demanded, or had not done the act, or made the promise on which the action was founded, judgment was pronounced in his favour. However, the party so called on to make oath was at liberty, if he preferred that course, to put his adversary to swear that his demand was just, and in case such oath were taken, the cause was equally decided in favour of the party so taking the oath. In either case, an equitable action, of which I have before spoken, might be brought by the gaining party, to obtain the fruits of his judgment. No proof, however strong, could be admitted to contradict the oath so taken; but the party, if suspected of perjury, might be proceeded against criminally; and, if convicted, he was liable to a severe and degrading corporal punishment. In either of the cases above adverted to, the party who refused to take the oath required had judgment pronounced against him. It was competent to the judge, in all cases where he was unable to come to a conclusion on the evidence produced by the parties, to put the parties to their oath, to inform his own conscience as to any matter arising in the cause,

even though against the consent of the parties[1]. This mode of deciding causes appeared to the barbarians so simple and expeditious, that it was, as we shall presently see, universally adopted by them, in criminal as well as civil proceedings.

Mode of enforcing Judgments.

After judgment was pronounced, which it was necessary should be conformable to the libel, a certain time was allowed to the defendant, within which to comply with the terms of the sentence. This time was different at different periods of the Roman history, and varied in real and personal actions[2]: in real actions, the term was left to the discretion of the judge; in personal actions, it was thirty days. After this term, if no good excuse could be given, execution according to the judgment was immediately ordered. In real actions, the thing adjudged to the plaintiff was taken from the defendant, if necessary, by military force; in personal actions, if the defendant had any property, it was seized by the public officer, and within a certain time sold to satisfy the demand, first the moveables, and, if they were not sufficient, then

Execution.

[1] See Dig. lib. xii. tit. 2. l. 5 Ibid. xxii. 3. 25. § 3. Inst. iv. 6. § 11. et Vinnii Comm. p. 806, and see the CODE NAPOLEON, *Du Serment Décisoire*, ubi sup.

[2] Vinn. ad Inst. de Offic. Jud.

[3] Vide Aul. Gell. xx. c. 1.

the immoveables. If the defendant had no property, he might be sent to prison, where he must, in such case, be maintained by the plaintiff [1]. The ancient practice of delivering the debtor to the creditor, that he might sell or dispose of his person for satisfaction of the debt, which is mentioned to have existed so late as the time of Cicero, was abolished in the time of the emperors [2].

Of the Cessio Bonorum.

A debtor who had become insolvent through misfortune [3], might protect his person from imprisonment by a *cessio bonorum*, or a surrender to his creditors of the whole of his estate [4]. The cession of goods acquitted the debtor only for so much as the value of the goods which he delivered up amounted to; he still continued debtor for the overplus, and the goods which the debtor might chance to acquire after the cession, were subject to his creditors, for what should remain still unpaid of their debts; but the creditors could not throw the debtor into prison for the debts contracted before the cession, nor strip him so completely of his new acquisitions, as not to leave him sufficient for his food and raiment [5]. The cession of goods did not immediately divest the person who made it of the property in

[1] Heinnec. ad Pandect. part vi. § 244.

[2] See generally on this subject, Sigonius, in the chapter De Addictione; particularly the quotation from Cicero's Oration pro Flacco.

[3] Comm. in C. Theod. iv. 20.

[4] Cod. Just. vii. 71. 1.

[5] Dig. xlii. 3. 4. and 6.

the goods which he gave up to his creditors; so that he might take them back, if, before the goods were sold, he found himself in a condition either to pay his creditors, or to produce sufficient grounds to resist their claims [1].

OF THE EXTRAORDINARY JURISDICTION OF THE PROCONSUL.

Distinction between the *ordinary* and *extraordinary* jurisdiction of the proconsul.

The distinction between the ordinary and extraordinary jurisdiction of the prætor and proconsul forms a most important feature in the judicial system of the Romans. This distinction, as regards the trial of causes, was broad and definite, and if I have rightly collected from the codes the nature of this distinction, and which I have no reason to doubt, it was as follows: Before the ordinary jurisdiction of the proconsul all causes were heard in which the rights insisted upon by the plaintiff and by the defendant had their origin in the laws of the twelve tables, the leges senatus consulta, plebiscita, and ancient customs founded on general consent, which, to borrow an expression familiar to English lawyers, may be denominated *the statute law* of the Romans, or were founded on the jus civile, or authentic expositions of these laws, which may be designated as the *common law* of the Romans; and there were, as we have

[1] Dig. xlii 3. 3. and 5. and see Domat. vol. i. p. 522.

just seen, formulæ of actions and of exceptions, namely, those denominated civil or direct[1], expressly adapted to the enforcing of these rights. All rights which were founded on the extended effect which was given to the statute and common law under the prætorian edicts and the imperial constitutions, or which, to use another phrase borrowed from our legal writers[2], were founded on the *equity of the statute and common law*, were equally the subjects of the ordinary jurisdiction of the prætor; and, as we have also seen, to enable litigating parties to enforce such rights, prætorian or civil formulæ[3], adapted to the corresponding express statute or legal formulæ, were invented. But, in regard to such rights as were unknown to the ancient statute and common law, as was the case in regard to trusts, which could only be enforced under the imperial constitution of which Augustus was the author, and the right to relief in regard to fraud and mistake, which was entirely founded on prætorian edicts[4],—these could only be enforced, whether at the instance of a plaintiff or of a defendant, under the extraordinary jurisdiction of the prætor or proconsul; and as the formulæ, in the registry of the prætor, were framed to meet the provisions of the ancient statute

[1] *Ante*, p. 155.

[2] See ix. Co. Reports, 40. a. vi. Co. Rep. 50 b. &c.

[3] *Ante*, p. 155—8.

[4] *Post*, p. 184.

and common law, there would, of course, be none that were adapted to the enforcing rights which had their origin from a different source; accordingly, as I shall presently notice, merely equitable rights were not enforced by means of any formulæ of actions or of exceptions.

The distinction between the cases which fell within the ordinary, and those which fell within the extraordinary jurisdiction of the prætor, which was almost coeval with the institution of the office of prætor, was kept entire down to the time of the dissolution of the western empire: thus affording a practical contradiction to the assertion of Lord Bacon[1], that "*neque servabitur distinctio casuum si fiat commixtio jurisdictionum: sed arbitrium legem tandem trahet;*" which has been considered by many as the strongest objection against the union of the two jurisdictions.

Mode of proceeding before the extraordinary jurisdiction of the proconsul.

The extraordinary jurisdiction of the proconsul was exercised by him in person, and was incapable of delegation, though the proconsul was always assisted by the advice of one or more experienced jurisconsults, whom he associated to himself as assessors. The emperor Zeno, about A. D. 474, directed, that, instead of the appointment of assessors being made by the judge on the occasion,

[1] De Augment. Scient. lib. viii. cap. 3. aph. 45.

a certain number of jurisconsults should be appointed as permanent assessors in each court, and whose duties were nearly the same as those which are exercised by the Masters of the Court of Chancery; but this institution had fallen into disuse in the time of Justinian [1].

In the exercise of this extraordinary jurisdiction, the proconsul administered the equitable doctrines which were embodied in the perpetual edict, and were contained in the authentic treatises which I have referred to in a former page [2]; but the prætors were expressly prohibited, first by Constantine, then by Valentinian [3], from introducing or acting upon any new principles of equity. The emperors from this time reserved to themselves exclusively the right to temper the rigour of the laws, and supply their deficiencies when there might still be occasion for such interposition; and it was competent to any judge, by sending the question to the emperor by way of *relation*, a process which I shall explain in a future page, to give the emperor an opportunity

[1] Vide Cod. Just. iii. tit. 3. Novell. Justinian. 82. The Persians, in the time of Julian, ridiculed the Roman custom which placed the ignorant governor above the learned assessor. Ammian. xxiii. c. 6.

[2] V. *ante*, p. 104.

[3] "Inter equitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere." Cod. Just. i. 14. 1. a law of Constantine, A. D. 326; et v. ibid. l. 9. a law of Valentinian.

of exerting this prerogative. The proconsul, in the exercise of his extraordinary jurisdiction, was bound as far as possible to follow the rules of the law [1].

Subjects of this jurisdiction.

The matters which were brought before the proconsul, in his extraordinary capacity, may be classed under five general heads: 1. The granting relief, on grounds of general equity; 2. The enforcing of trusts; 3. The granting of interdicts and injunctions; 4. The care of minors, and persons incapable of protecting themselves; and, 5. The decision of questions affecting the freedom of individuals.

1. Of granting relief on grounds of general equity.

Relief on grounds of general equity.

The prætor, under his extraordinary jurisdiction, had the power to award what was called *a restitution in entirety*, at the suit of any person who had been induced by fraud, or circumvention, or under a mistake, or by force, or under the influence of menaces [2], to alienate his property, or conclude any stipulation or contract which was binding in law [3]. The same relief was granted under

[1] "Jus Prætorium, jus Civile subsequitur." Dig. xii. 5. 14.

[2] "Plurifariam prætor hominibus vel lapsis vel circumscriptis subvenit, sive metu sive calliditate sive ætate sive absentia inciderunt in captionem, sive per status mutationem, aut justum errorem." Dig. iv. 1. 1.

[3] Heinnec. ad Pandect. §

this jurisdiction, at the instance of persons above the age of fourteen, and under the age of twenty-five years, who had been induced to part with their property, or to enter into any stipulation or binding contract[1]. Such restitution had the effect of entirely annulling all the acts of the party which he thus sought to set aside, and placed him in the same situation as if they had never been done. A restitution in entirety was also granted under the equitable jurisdiction of the proconsul against any title by prescription, which might have been gained to any part of the property of a person who, when such title was acquired, was absent in the service of the state, or from any other just or necessary cause[2]. The proconsul, in administering this equitable relief, was equally bound to follow the rules laid down in the perpetual edict, and in the accredited books I have before referred to, as he was to follow the rules of law when sitting in his ordinary jurisdiction.

2. Of Trusts.

"The invention of fidei commissa, or trusts, arose from the struggle between natural justice and positive jurisprudence. A stranger of Greece or Rome might be the friend or benefactor of a childless Roman, but none except a fellow-citizen Trusts.

459, and the Digest as there cited.

[1] Heinnec. § 462.

[2] Ibid. § 511.

could act as his heir. The Voconian law, which abolished female succession, restrained the legacy or inheritance of a woman to the sum of 100,000 sesterces; and an only daughter was condemned almost as an alien in her father's house. The zeal of friendship and parental affection suggested a liberal artifice: a qualified citizen was named in the testament, with a prayer or injunction that he would restore the inheritance to the person for whom it was truly intended[1]." This is a pretty accurate account of the origin of trusts.

Created by will.

Until the time of Augustus, trusts could not be enforced, but were left to the honour of the individual in whom the testator had reposed his confidence; but from the reign of this emperor, trusts were recognized by the law. In the time of Claudius two prætors or judges were created at Rome, who were specially charged with the jurisdiction of enforcing the performance of trusts[2]. In the provinces, trusts were enforced by the proconsul under his extraordinary jurisdiction; and it was not necessary that any settled formula should be used by the party who sought the performance of a trust[3].

"In order to constitute a trust, it was necessary

[1] Gibbon, c. xliv. vol. viii. p. 81.

[2] Inst. 11. 23. 1. and see Dig. i. 2. 2, 32. Sueton. Claud. xxxiii. 23.

[3] "Fidei commissa, non per formulam, petuntur." Tit. ex Corp. Ulp. tit. xxv. pr.

there should be an appointment of an heir, and the trust was created by the addition of the request or injunction, which, on the first institution of trusts, might extend to the whole or a part of the inheritance. This request might be made either simply or on condition, or it might have relation to some certain fixed period, to happen after the testator's death; the technical reasoning which prevented the suspension of the legal representation not being applicable to the suspension of the operation of a trust [1]. In the time of Nero, a senatus consult was passed, by which it was declared, that the person to whom an entire inheritance was directed to be given up should be considered to be the actual representative, and liable to all the burthens of a legally constituted heir [2]; but as it was found that no one would consent to become a mere nominal representative, which was the case when the whole inheritance was to be given up to another, it was enacted, in the time of Vespasian, that he who was appointed heir upon trust, should be at liberty to retain, for his own use, one-fourth of the inheritance; and the heir so appointed, and the person to whom the rest of the inheritance was given up, were directed to share proportionably the burthens of the succession [3]. A person on the point of death was at liberty,

[1] Inst. ii. 23. 2.

[2] Ibid. ii. 23. 4. The *use* was transferred into *possession*.

[3] Inst. ii. 23. 6.

without making a will, to impose upon his legal representatives a trust or obligation to deliver a certain portion of the inheritance to any person he might appoint [1], and it was not essential to the constitution of such a trust that it should be expressed in writing. Not only might a testator give an aliquot part of the inheritance in trust, but also a farm or slave, or any other thing that he possessed [2]. The doctrine of trusts being established in regard to wills, conveyances in trust were introduced. Conveyances of this description were first made use of as a contrivance for eluding the public burthens, to which the owners of land were liable. Thus, a purchaser of land, who desired not to become a decurion, had his land conveyed to some person already a decurion, upon a secret trust for himself. To avoid such fraudulent conveyances, it was declared that property so conveyed should be forfeited to the imperial treasury [3].

Conveyances in trust.

Where a person sought relief on merely equitable grounds, he did not proceed by way of action, but he addressed a libel to the proconsul, stating his case, and praying relief adapted to such case; and the defendant was called upon to defend himself by a written answer. So where a person sought to avoid a stipulation or contract, on the grounds of fraud, mistake, or force, the equitable grounds

[1] Inst. ii. 23. 10.
[2] Ibid. ii. 24. 0.
[3] Dig. L. 1. 15. § 2. v. *ante* p. 9.

were insisted on by an exception containing a written detail of the circumstances: such a defence brought the cause at once under the extraordinary jurisdiction of the proconsul, who could not then send the cause to the decision of delegated judges [1], and thus *ipso facto* operated as an injunction against any further proceedings at law, without the expense or formality of presenting a libel, or instituting any proceeding addressed to the proconsul under his extraordinary jurisdiction.

3. Of granting interdicts and injunctions [2].

Interdicts and injunctions.

In actions for the recovery of things, the possessor had of course a great advantage, as he was relieved from the trouble and expense of proof, at least until the demandant had made out a title [3]. By the perpetual edict, it was declared to be inequitable, that any one who had obtained possession against good faith or by violence, should have this advantage: it was therefore permitted to a party who complained that he had been deprived by force of his lawful possession, or that the possession was retained from him

[1] Heinnec. § 466.

[2] Inst. ii. 23. pr. § 1 and 25. Dig. i. 1. 11. Rosinus, p. 667.

[3] "Et quia longe commodius est et potius possidere quam petere, ideo plerumque, et fere semper, ingens exstitit contentio de ipsa possessione," says Justinian, Inst. iv. 15. 4. Possession, as we know, is still considered as *nine points of the law.*

against good faith, even when the detainer claimed the property, to summon such person before the proconsul, who on a summary hearing, under his extraordinary jurisdiction, decided on the question of possession, and pronounced an interdict, either confirming the possession in the possessor, or ordering it to be restored to the party dispossessed; and where that was expedient, directing that good security should be given, that in the mean time the property should not be injured. So a person having a right to possession, but which he had never been able to exercise, might in certain cases apply for an interdict against the possessor, for the purpose of obtaining possession preparatory to litigating the question of title [1].

The proconsul also exercised a summary jurisdiction by interdict or injunction, to prevent a person from doing an act, in the assertion of a doubtful right, from which irreparable or lasting mischief might ensue: thus the making any erection on the banks or in the stream of a public river, so as to impede its navigation, might be restrained by injunction [2]. The proconsul also interfered by injunction to prevent any threatened injury to the soil of another, as the building of a house or the like, even though the injury might not be lasting or irreparable; but in such cases the defendant, on giving good security to pull down

[1] Inst. iv. 15. 1. et seq. [2] Inst. iv. 15. 1.

the building or restore the place to its original condition, was permitted to proceed in his undertaking [1]. Exhibitory interdicts also were granted under the summary jurisdiction of the proconsul; as when any person detained a child not emancipated, the father might obtain from the proconsul, on a summary hearing, an interdict, commanding the person so detaining to produce the child [2].

4. Of the protection of minors and of persons incapable of managing their affairs.

Protection of minors, lunatics, and prodigals.

The protection of persons under age, and of idiots and others of unsound mind, and of those who from prodigal habits were unable to govern themselves and their property, was committed to the proconsul or governor of the province, by the special appointment of the emperor as parens patriæ [3]. The proconsul, under this authority, watched over the conduct of guardians and tutors, and enforced the performance of their duties, and gave directions as to the maintenance of minors and other persons under tutelage out of their property [4], and provided for the proper education of minors. It was competent to the proconsul to remove a child from the guardianship of the person specially appointed by the will of the parent, if in his discretion he thought it requisite to have recourse

[1] Dig. xxxix. i. 20. "Novi nunciatio."

[2] Inst. iv. 15. 1. et seq.

[3] Dig. xxvi. 5. 8. 3. ib. l. 12.; ibid. tit. 18. 1. § 3.; ib. tit. l. 6. § 2. Instit. i. 23.

[4] Dig. xxvii. 2. l. 1. l. 3. and l. 5.

to so violent a measure. In the 26th and 27th Books of the Digest may be found rules for regulating the administration of the estates and property of minors, and the enforcing the duties of guardians, and compelling them to account, very analogous to those which are scattered in our voluminous books of reports.

Questions relating to slavery.

5. Of questions relating to slavery.

If an individual were claimed as a slave [1], or as a freedman, or if any question arose as to the services or reverence due from a freedman to a patron or his children, the matter was discussed before, and decided upon by, the proconsul in person, under his extraordinary jurisdiction.

The parties were most commonly examined on oath in all cases brought before the proconsul sitting in his extraordinary jurisdiction.

Causes relating to the revenue.

The emperor Nerva [2] appointed a particular judge at Rome, who had cognizance of all questions between individuals and the imperial exchequer; but the ordinary governors of the province appear to have all along exercised jurisdiction in these causes in the provinces. In causes concerning the revenue, the governor was bound in all cases to appoint an advocate of known talent to conduct the case on the part of the crown; and in the tribunals of the prætorian præfects, there

[1] Plin. Epist. x. 77.
[2] Dig. i. 2. 32. and ibid. xlix. 14, 42. and the notes of Gothofred.

appear to have been a certain number of counsel, *advocati fisci*, who were the standing counsel of the crown. In later times, indeed, it became a common practice for the emperor to send a judge, specially appointed, for the purpose of trying the revenue cases in each province. An appeal was given from the decision of such judge, to the count or chief officer of the imperial exchequer [1].

Amendments in the forms of Justice in Civil Cases, introduced by Constantine and his Successors.

"Corruptissimâ republicâ plurimæ leges."—Tacit. Annal. iii. c. 27.

Alterations in the forms of pleading in civil actions.

Down to the reign of Constantine, in civil actions, the ingenuity of lawyers might be exerted in defeating the real ends of justice, by putting the decision of the question between the parties upon the mere form of the formula of action or other pleading, by means of which the plaintiff or defendant attempted to bring his case before the judge for his decision. Constantine, fully sensible of the injustice which in many cases resulted from allowing the rights of the parties to depend on a compliance with the mere technical rules of pleading, abolished the use of the ancient formulæ; and from this time all actions, whether founded on the civil or prætorian law, appear to have been framed as general actions in the case, and they obtained the name of *narrations* or *counts*. Exceptions were framed in

Abolition of formulæ.

[1] Cod. Theod. xi. 30. 28. et Comm.

a similar manner, and were denominated *contradictions* or *answers* [1]. The ceremony too of applying to the proconsul for the formula of the libel or count, was abolished by Theodosius [2], and the plaintiff was permitted of his own authority to use such libel or count as he was advised was suited to his case [3]. A further reform was introduced by prohibiting the defendant, in those causes which were of the most frequent occurrence, from demanding as of course the delay which, according to the ancient practice, he was entitled to, after his appearance, before he was bound to make his defence, and which delay, from three days, had by custom been extended to a much

Delays as of course prohibited.

[1] See Cod. Just. iii. 1. 14.

[2] Cod. Just. ii. 58. 1. "Juris formulæ aucupatione syllabarum *insidiantes* cunctorum actibus radicitus amputentur." I have in the Appendix stated, from a pamphlet published by Mr. Swinton, a gentleman of great experience as a writer to the signet in Edinburgh, the mode of proceeding in civil cases before the Court of Session in Scotland. The system which there prevails appears to have been taken from the amended mode of proceeding among the Romans introduced by the imperial constitutions mentioned in this and the succeeding notes; as the forms in use in England appear to have been in a great degree taken from the ancient form, without reference to such amendments. The inconveniences resulting from the laxity of practice allowed in the Scotch tribunals, have called for the interference of the legislature.

Neu te dexterior tortum declinet ad Anguem,
Neve sinisterior pressam rota ducat ad Aram;
Inter utrumque tene.
Ovid. Metam. lib. ii.

[3] Cod. Just. ii. 58. 2.

more considerable period[1]. From the time of Theodosius also, the appearance of the defendant was not, as theretofore, enforced by the plaintiff himself, but by a precept or summons, which was served on him by an officer of the court at the instance of the plaintiff[2].

Alterations in the mode of hearing causes.

In the reign of Diocletian, a most important alteration was made in the mode of hearing civil causes. The frequency of the appeals from the delegated judges, assigned under the ordinary jurisdiction of the proconsul, had become a serious evil: the emperor, with a view to afford an adequate remedy, by an edict promulgated in the year 294[3], directed that the proconsul himself, unless prevented by being occupied in his other official duties, or unless pressed by a multiplicity of business, should himself hear all the causes brought before him. From the time of the promulgation of this edict, causes of moment were generally heard and decided upon by the proconsul in person: but the assistance of delegated judges was still called in, in causes of small amount, and they from this time acquired the name of *pedanei judices*[4]; though it appears by a declaratory edict published by Julian A.D. 362,

[1] Cod. Theod. ii. 4. 6. and the Commentary.

[2] Ibid.

[3] Cod. Just. iii. tit. 3.

[4] Which may be rendered not inaptly *judges of piéd poudre*.—Vide Gothof. not. in Cod. Just. iii. tit. 3. 2. Cod. Theod. xiii. 4. 4.

that in his time it had been doubted whether the governor could refer any cause, however trifling, to delegated judges [1]. What might have been the beneficial effects in better times of the abolition of these ancient forms, it is impossible now to ascertain; but, as I shall have occasion to mention in a future page, the effect of this as of every other improvement, was counteracted by the baneful operation of the corruptions which had introduced themselves into all branches of the government, and which were rapidly impelling the mighty fabric of the Roman empire to merited destruction. I proceed to the fifth branch of the subject now under consideration; namely, the laws which related to public offences.

SECTION V.—LAWS RELATING TO PUBLIC OFFENCES.

Of Crimes.

No act amounted to a crime that was not intentionally committed. The perpetrator of a crime was bound to repair the damage occasioned by it; and moreover was in most cases liable, on grounds of public policy, to punishment, the state being interested, independently of all private con-

[1] Cod. Just. iii. 3. 5.

siderations, that men should be deterred from the commission of crimes[1]. By the ancient law, the acts which subjected a party to punishment, were very minutely defined. The imperial constitutions, which were often dictated by mere caprice, threw this branch of the Roman jurisprudence into great confusion.

Private. Crimes were classed under two general divisions, *private* and *public*[2]. Private crimes included robbery[3], and those degrees and kinds of damage and of injury which have already been noticed as amounting to wrongs, in the section which treats of actions arising from wrongs.

Public. Public crimes were of two classes, ordinary and extraordinary.

Ordinary public crimes. *Ordinary public crimes* were such as were the subject of some particular law, which defined the offence, and affixed to it a precise and particular punishment[4], which punishment was either capital, including civil as well as natural death, or short of capital.

Extraordinary public crimes. *Extraordinary public* crimes were those which had by general assent been admitted to be such as required to be prohibited by the inflicting of punishment, but which were not made criminal by any specific enactment. In general no definite punishment was affixed to offences of this nature, but the measure of the pu-

[1] Heinnecc. ad Pandect. vii. § 79, and authorities there cited.

[2] Ibid. vii. § 103.

[3] Ibid. § 79.

[4] Ibid. § 154.

nishment was left to the discretion of the judge [1]. Of this description were the crimes of violating a tomb, extortion, prevarication, the name given to the offence committed by a public prosecutor who colluded with the delinquent [2], the receiving and abetting of thieves, the forcing of prisons, stellionate or practising of imposture, the removing of boundaries, and the combining in companies or societies without the authority of the emperor [3],—each of which acts gave rise to a criminal prosecution; and where an injury resulted to any individual, also to a civil action for restitution or satisfaction at the suit of the person injured.

Capital punishment.

Of crimes which came under the description of capital, the offence visited with the severest vengeance was that of treason, or the being guilty of any machination against the person or dignity of the emperor [4]. By the ancient law, and indeed by the law as it is to be found in the Digest of Justinian, who appears to have been shocked at the sanguinary laws of his predecessors, murder, highway robbery, and a few other crimes of an atrocious nature, were all that were enumerated under the class of capital crimes. By the imperial constitutions, the punishment of death was frequently imposed for offences of a trifling nature;

[1] Ibid. § 126.
[2] Ibid. § 134.
[3] Ibid. § 147. and 151.
[4] Ibid. § 173.

some of those offences too were so ill defined as to put even the most circumspect in considerable peril; thus he who cut down a vine or fruit tree was in danger of his life, if he were charged by an informer with having done so with a view to reduce the rate of his census [1].

Banishment.

The punishment in general use, next in degree to natural death, inflicted on those in the higher ranks of life, was banishment [2], which ordinarily imported civil death, but mere banishment to an island was not attended with civil death. The following, amongst other crimes, were visited with this punishment; namely, adultery, the forging of a will or similar instrument, extortion in the administration of a public office of the state, peculation, and various other crimes of a similar nature. Condemnation to the mines, either for life or for a term of years, was generally imposed upon persons of inferior rank for crimes, for which the higher orders of citizens were punished with banishment and confiscation.

Condemnation to the mines.

Fines.

The imposition of fines, payable to the state, varying in amount according to the nature of the offence and the wealth of the individual, was the

[1] Cod. Theod. xiv. tit. 11. 1. In the latter years of the empire, *burning alive* became a common punishment. Ammian. xviii. c. 1. xxix. c. 4.

[2] As an instance of the disproportion of punishments, he who put up a shed in the Campus Martius was liable to be banished. Cod. Th. xiv. 14. 1.

punishment inflicted on persons in the higher ranks of society for offences of inferior magnitude; and for offences of the same degree committed by persons in the lower ranks of life, the infliction of a certain number of blows with thongs laden with lead, was the ordinary punishment. Whenever the punishment of death, *capitis diminutio*, whether natural or civil, was inflicted, forfeiture of property to the crown commonly formed part of the punishment. Valentinian, however, allowed the property of criminals guilty of capital crimes, with the single exception of treason, to go to their children, if they had any. Gratian, still more merciful, gave to the children a share in the property even of a traitor[1]. In offences which called for a punishment less than capital, some part of the goods of the offender might generally be claimed by the imperial exchequer.

Corporal chastisement.

Forfeitures.

Mode of proceeding in Criminal Prosecutions.

Laying of the information.

The prosecutor who sought to bring a suspected criminal to justice was bound[2] to lay a complaint before the proconsul, or before the duumvir, defensor, or keeper of the peace, or, in their absence, before some of the primates of the decurions. When the information was laid before a magistrate

[1] Cod. Theod. ix. 42. 6. and 8.

[2] Heinnec. ad Pandect. part vii. § 157.

who had not jurisdiction to try the prisoner, he was bound, with all speed, to send the prisoner and the prosecutor, together with a written detail of all the circumstances of the case, to the proconsul, or judge of the province or place where the crime was committed [1]. No magistrate who had not criminal jurisdiction could commit to prison [2], excepting where the criminal was taken in the act of perpetrating an atrocious crime; and if any one presumed to commit a man, on any pretence whatever, to a private place of confinement, he was held guilty of treason.

The accusation being laid before the proconsul, or other competent magistrate, if the crime were of considerable magnitude, and the proofs, or presumptions strong, the criminal might be committed by him to prison for safe custody until his trial; if he were a person of rank, it was usual to put him in charge of a soldier [3], to whom for security he might be chained. If the offence were not of any considerable magnitude, he might be let out on bail. When the criminal was committed to prison, it was unlawful to convert his confinement into a punishment, or to impose any restraints upon him other than such as were necessary to prevent his escape [4]; and from the time of Constantine, the gaoler was bound publicly to exhibit all his prisoners on every Sunday. Commitment.

[1] Cod. Theod. ix. 1. 10.
[2] Ibid. ix. 2. 5.
[3] Heinnec. ubi sup. § 166. See the Acts of the Apostles, c. xii.
[4] Ibid. § 167.

In the latter years of the empire, no person could be brought to trial on any criminal charge, unless a magistrate had first decided that there were good grounds for the accusation [1], and it was incumbent on the proconsul to cause the prisoner to be brought to trial as soon as possible after his commitment [2].

The trial.

The trial [3] of a criminal always took place in the forum, openly before the people; and the proconsul himself, according to ancient custom, presided at the trial.

Jury for trial of criminals.

According to the ancient form, which I do not find to have been discontinued [4], though it may have been subject to variations at different periods, a certain number of persons in each town throughout the province were annually appointed to perform the office of criminal judges, or assessors to the proconsul in that province; and in the provinces, as at Rome [5], these assessors were appointed from the superior classes of citizens: there is reason to suppose that originally they were se-

[1] Cod. Theod. ix. 2. 4.

[2] Ibid. ix. 1. 18.

[3] See Sigonius de Judiciis, et de Antiq. Jur. Provinc., and the Antiquities of Rosinus and Adam.

[4] The laws from which Gibbon and others have conceived that the mode of trial by *judicati homines* was discontinued from the time of Diocletian, solely relate to *pedanei judices*, or delegated judges in *civil* cases.

[5] "Ad *tres judicum decurias*, quartam addidit ex inferiori censu Augustus." Sueton. in vit. cxxxii.

lected from the decurions alone; but when persons of inferior rank at Rome were called upon to act as jurymen, a similar extension of this burthen to those below the rank of decurions, but who had a moderate amount of property, would naturally take place in the provinces [1]. The duty of serving as a criminal judge or juryman was one from which no person who was qualified to serve was excused [2].

Form of trial.

On the day appointed for the trial of a criminal, for which day the judges so appointed were cited to attend, a certain number of the judges or jurymen who appeared in obedience to their summons [3], were chosen by lot to sit in judgment on the criminal; and the prosecutor, as well as the criminal, was at liberty to challenge any one of the judges so chosen, and to require another judge to be substituted in his stead. A written libel or statement was then delivered in, precisely defining the nature of the crime, with all the particulars of time, place, and circumstance, and which the prosecutor was bound to subscribe [4]: no charge could be advanced against the criminal which was not clearly defined in the libel; and every prosecutor became liable

[1] See the preceding note.

[2] Dig. l. 4. 3. 15.

[3] Thus Pliny, in one of his letters to Trajan, lib. x. says, "Cum citarem *judices*, domine, conventum inchoaturus."

[4] Cod. Theod. ix. 1. 14. Heinnec. ad Pandect. part vii. § 157, &c.

to a certain punishment in case the charge should prove to be unfounded, and which, by a law of Honorius, was fixed to be the same penalty as would have been inflicted on the person accused, in case the crime imputed had been proved [1]. If the accused were unable himself to procure an advocate, he might, unless in trials for treason, require one or more to be assigned by the proconsul to assist him in his defence. The proconsul and the assessors or jury, who were sworn to give their judgment uprightly and according to law, having heard the advocates of the prosecutor, and his evidence, which was very commonly extorted by the application of torture to the slaves of the criminal, and having heard the advocates, witnesses, and other evidence of the criminal [2], the proconsul, publicly sitting in the forum, declared the verdict which the majority of the jury agreed upon, and, when that verdict was against the accused, pronounced the sentence of the law. The proconsul was bound to enforce the execution of the sentence, with all due expedition after the termination of the trial [3]; and in no case was it permitted that the trial and

Verdict.

Execution.

[1] Plin. Epist. i. 20. et v. 1. Cod. Just. ix. 46. 10.

[2] It seems rather extraordinary that the prosecutor alone could compel the attendance of witnesses in criminal trials. See Plin. Epist. v. 20. vi. 5. Quintil. v. 7; and yet formerly such was also the common law of England in capital cases. Starkie on Evidence, vol. i. p. 118.

[3] Cod. Theod. ix. 1. 18.

sentence should be delayed beyond a year from the time of the information being laid before the committing judge or magistrate [1]. Prosecutions for crimes generally might be commenced at any time within twenty years from the time when the offence was committed [2]; but as to some crimes, as for instance adultery, five years was the time limited for prosecuting the offender.

Limitation of prosecutions.

Relations and Appeals.

The right of appeal from the sentence of inferior to the superior tribunals, in criminal as well as civil proceedings, was recognized and practised from the earliest history of the Roman jurisprudence. Constantine introduced a mode of obtaining the opinion of the emperor, by way of *relation*, without going through the process of appealing; and this emperor and his successors reduced the rules, in regard to relations and appeals, to a complete and regular system.

If in the progress of any cause, whether civil or criminal, before the proconsul, vice-prefect, or prætorian prefect, any question of great importance or difficulty arose, it was competent to the judge, at his discretion, before judgment given, to refer such question to the decision of the emperor; but the judge was bound first to communicate such his

Relations to the emperor.

[1] Cod. Theod. ix. tit. 36. § 1272. Cod. Just. ix. 22.
[2] Heinnec. Elem. Jur. Civil. 12.

intention to the parties, who were at liberty to deliver to the judge, in writing, their reasons in favour of their side of the question. The judge was bound to transmit a transcript of all the proceedings and evidence, both documentary and oral[1], with the reasons, to the emperor, who decided the case on a consideration of the written documents without the viva voce arguments either of the parties or of counsel, and embodied his decision in an imperial rescript[2].

Appeals.

No judgment pronounced by any tribunal was final, excepting the sentence of the prætorian prefect; but in general no appeal was allowed from an interlocutory order[3]. If either of the parties in a civil cause, whether tried under the ordinary or extraordinary jurisdiction of the proconsul, were dissatisfied with the judgment, he might appeal to the vice-prefect of the diocese: and from this tribunal there was an appeal, as it would appear, either to the prætorian prefect, or to the emperor, at the option of the party. To prevent any difficulties being thrown in the way of appeals by

[1] All evidence, therefore, must have been taken down *in writing*, both in civil and criminal proceedings. The practice of obtaining the evidence of absent witnesses *by commission* was introduced by Justinian, Cod. Just. iv. 21. 18.

[2] Cod. Theod. xi. 29. Ibid. xi. 30. 55. The mode of proceeding in Scotland on appeals from the Lord Ordinary to the Lords of Session seems to have been framed on this model. See Appendix, No. II.

[3] Cod. Theod. xi. 30. 40. Ibid. tit. 36. l. 18, and 29.

the judge who pronounced the judgment, the emperor Constantine thought it necessary frequently to remind all judges, that, as the right of appeal had always been recognized and practised, they were not to consider the lodging an appeal as evincing towards the judge the slightest degree of disrespect [1]. On the notice of appeal being given to the judge by the appellant, the judge was bound to cause a transcript of all the proceedings, and of the evidence given on both sides, and of his judgment, which was of no effect until reduced into writing [2], to be made out by the proper officer of his court. The appellant then delivered to the judge his reasons, in writing, against the judgment; and the party in whose favour the judgment was given, might also deliver his written reasons in its support. The judge was bound to transmit the whole to the appellant tribunal within thirty days from the notice of appeal being given: on refusal, or neglect, he was liable to a fine of thirty pounds weight of gold [3]. The appellant judge was bound to receive the appeal, not as matter of favour, but of right; if an appeal were rejected, all the secretaries and officers attached to the court of appeal were liable to a heavy penalty, unless they could show that they had used their best en-

[1] See Cod. Theod. xi. 30. l. 4. l. 11. l. 12. and 15. particularly the 11th and 15th.

[2] Ibid. iv. 17. 1.

[3] Ibid. xi. 30. l. 22. 25. 30. and 35.

deavours to have the appeal received[1]. When the appeal was heard before the vice-prefect, or prætorian prefect, the cause was argued by the advocates of the parties: but Constantine, finding that it was a common contrivance to keep back some material fact until the hearing of the appeal, ordered that no new fact should be introduced on the argument of an appeal[2]. In appeals made to the emperor, in the same manner as on relations, the question, as it appeared upon the written documents, was discussed without any viva voce argument by advocates or by the parties, in the consistory of the emperor, which was composed of the imperial questor or chancellor and other great officers of state, the emperor pronouncing the decree. If the decision were delayed for a year from the time of the transmission of the appeal, the parties were at liberty personally to solicit the emperor for his judgment; but until that delay had elapsed, they were not allowed to make any application for a decision[3].

In general cases, the same right of appeal existed in criminal as in civil proceedings, but a criminal, condemned on his own confession, or convicted of any atrocious crime on direct evidence, was denied the opportunity of delaying his sentence by an appeal[4].

[1] Cod. Theod. xi. 30. 58.
[2] Ibid. xi. 30. 11.
[3] Ibid. xi. 30. 47.
[4] Ibid. xi. 36. 1 and 4.

As the utmost facility of appeal was given, where there were just grounds for impugning the judgment, it was thought necessary, on the other hand, to discourage the carrying appeals to the last resort, merely for the purpose of vexation and delay; and accordingly, the prætorian præfect was authorized by Constantine, when an appeal of this description was brought before him, to sentence the appellant, if a person of superior rank, to transportation for two years, and forfeiture to the crown of one half of his property; if a person of low degree, to condemnation to the mines for a term not exceeding two years [1]. But the emperor was fully aware that no penalty could check the accumulation of appeals where the suitor was unable to obtain in the inferior tribunals, not only impartial justice, but also such a hearing as should lead him to believe that his case had been fully investigated. The judges therefore were explicitly directed, remembering the purpose for which alone they had been advanced to their offices, patiently to hear and consider all that was offered by the one side and by the other; and though to every judge was left the exercise of that temperate control over the advocates of his court, without which his competency might be called in question [2], they were forbidden, by impatient interference or arrogant interruption, to deprive the

Precautions against vexatious appeals.

Directions to judges as to hearings.

[1] Cod. Theod. i. 5. 1.

[2] Dig. i. 16. 9. 2.

suitor of his right to a full investigation of his case in all its necessary details [1].

Conclusion. This closes the account which I have thought it requisite to give of the Roman laws and institutions; in which I have endeavoured to present to the reader a general view of those leading principles which would take the deepest root in society. The laws, in their detail, were clouded by the dark and frequently inconsistent constitutions of the emperors, and by subtleties and distinctions which, though founded on the nature of things, had been multiplied and refined upon by the ingenuity of a long succession of lawyers, until their original could scarcely be traced to any rational principle. Such, indeed, was the extent of this evil, that the rules which were applicable to the questions arising in the common transactions of life were involved in the most perplexing obscurity; and considering that on every question of intricacy it was necessary to search the written laws, and where they were silent to resort to the unwritten law, and to extract the result of the various and frequently discordant opinions that were to be found on the subject, the decision of the judge in such a case could only be matter of conjecture. The administration of the laws, too, besides being impeded by

[1] See particularly Cod. Theod. xi. 18. f., and see on this subject the 2d of the 6th book of the letters of Pliny, himself a model of a judge, an advocate, and a gentleman.

a superabundance of forms was encumbered to a serious extent with the clumsy machinery of *legal fictions*, which tended, as must be the case in whatever system of jurisprudence they may be admitted, to bring discredit on the law and its professors; for however well understood by lawyers themselves, such contrivances cannot fail to carry with them, in the eyes of the public, the appearance of absurdity, and it is to be feared sometimes of imposture. But the evils of which the Romans had to complain were not confined to the obscurity and complexity of the law: the administration of justice was corrupted in its source in a manner that, in our days, I am proud to say, can scarcely be conceived. The prætorian prefects, in the latter years of the empire, contrived to exempt themselves, in a great degree, from the superintending control of the emperors [1], and thus were enabled with impunity to pervert their authority to the purposes of rapine and oppression. The inferior governors and magistrates [2], who had too fre-

[1] Thus Valens suffered himself to be persuaded that it was beneath the dignity of an emperor to trouble himself about the disputes which arose between private individuals, so that his præfects and judges were left entirely without control. Ammian. xxx. c. 4.

[2] Theodosius, noticing how ineffectual were the penalties already imposed for the prevention of peculation on the part of the governors, imposed the punishment of death. See Cod. Theod. ix. 28. 1. and the Comment.; and see note (*y*) of Valesius, to c. 5, book xxx. of Ammian's History.

quently given a reward for their appointment to the prætorian præfect, or some favourite of the emperor, naturally looked for remuneration to the bribes of the suitors of their court. The venality and rapacity of advocates, too, had arrived at such a height in the latter years of the empire, as to become a serious grievance to the provincials[2], and, strange as it may now appear, it was no uncommon practice for the same person to sit as assessor to the judge, and to act as counsel for one of the parties in the cause[3]. The effect of these corruptions was most disastrous and afflicting: notwithstanding that the forms of justice were simplified, and many sources of delay which had existed in the

[1] The following law of Valentinian shows what, according to the true Roman notions, the conduct of an advocate ought to have been: "Apud urbem autem Romanam etiam honoratis qui hoc officium putaverint eligendum, eo usque liceat orare, quousque maluerint, videlicet ut non ad turpe compendium stipemque deformem hæc arripiatur occasio, sed *laudis per eam augmenta quærantur*: Nam si lucro pecuniaque capiantur, velut abjecti atque degeneres inter vilissimos memorabuntur." Cod. Just. ii. 6. 6. § 5.

[2] V. Cod. Just. ii. 6. 6. § 4. Amm. Marcellin. lib. xxx. c. 5. from the passage "At nunc videre ut per eos," or if that reading is to be adopted, "per Eoos," and Cod. Theod. ii. 10. 1. and the commentary. Pliny, in his Letters, and Tacitus, Annal. xi. c. 5 and 6. notice the incipient evil; which is observed upon by Gibbon, vol. iii. p. 56.

[3] Cod. Just. ii. 7. 6. pr. Justinian endeavoured to correct this practice by severe prohibitory laws. Novell. viii c. 1, &c. xxiv. c. 2, &c.

ancient practice were removed, such were the impediments thrown in the way of the course of justice, that the emperor Justinian, in the year 530, declared that it was necessary for him to interfere to prevent the duration of law-suits exceeding the life of man, and becoming, to use his own expression, almost immortal. Indeed the ample term of three years, within which the judges were commanded to see that all causes were concluded, may convince us that the language of the emperor was not strained much beyond the truth [1]. Justinian, as one means of checking the enormous abuses that prevailed, took care to keep the judges in perpetual remembrance of their duties, by precisely pointing them out in an oath which he directed to be administered to the judge, on the trial of every cause; and with a view to revive in the breasts of the advocates that high sense of honour and integrity which had in former times [2] obtained for the members of their profession the merited admiration and respect of all classes of the community, and without which no legislator can prevent the forms of justice being perverted to the worst purposes of iniquity, the emperor directed that each advocate should take an oath, in every cause in which he was concerned, that he would use his utmost endeavours to procure for his client

[1] Cod. Just. iii. i. 13.

[2] V. Ammian. xxx. c. 14. "Florebant elegantiæ priscæ patrociniis tribunalia," &c.

that which he conceived to be just—that he would not advocate a cause that he knew to be unjust—and that he would abandon a defence which he should discover to be supported by falsehood or iniquity[1].

I cannot part with this sketch of the Roman laws and institutions without apprising the reader that, although I have drawn the details which are contained in the preceding pages from original documents, namely, the Roman writers and the codes, which I have used my best endeavours to understand, with the assistance of the works of such modern writers as were within my reach, yet that I have not been able to consult many valuable works which would have greatly elucidated the subject, and have enabled me to have detected many errors and misapprehensions into which I fear that I may have fallen. The works to which I principally allude are, *The History of Rome*, by Niebuhr—*An Inquiry into the Early History of the Roman State*, by Professor Wacksmuth[2]—*Sketch of Roman Antiquities*, by Creuzers[2]—and, above all, Savigny's *History of the Roman Law during the Middle Ages*. A translation,

[1] Cod. Just. iii. i. 14.

[2] A very instructive article on the subject of the above-mentioned works is to be found in the last number of the Quarterly Review, p. 67-92.

by Mons. L'Etienne, of a most useful work entitled *Introduction à l'Etude du Droit Romain, contenant l'Histoire des Sources de la Jurisprudence Romaine*, has also just come to my hands, which has apprised me of numerous other works which it is imperative upon every one who shall pretend to give a correct account of the Roman laws and institutions well to consider. But though a perusal of those works might have enabled me to correct many errors, and supply many omissions, I have great satisfaction in stating, that so far as I have been enabled to make myself acquainted with the contents of these works, from the notices of them to be found in the Quarterly Review, the Annales de Legislation, and the work of M. L'Etienne, I have reason to think they will be found to confirm the view I have taken of the Roman laws and institutions, in its leading features. One remark, too, I cannot but add, in regard to what had appeared to me on first entering upon this study as a glaring paradox:—it has been stated, and the testimony of Ammian alone is sufficient authority for saying, truly, that the period to be selected as that in which the Roman people were suffering the greatest miseries, is the time which elapsed from the reign of Constantine down to the destruction of the western empire; and yet some of the most enlightened doctrines of which the Roman codes have to boast are to be found in the rescripts which were published during that interval. The

principal cause appears to have been this, that before the general corruption which pervaded the whole system of provincial government in the latter years of the empire, the principles of justice which are detailed in the imperial rescripts of those days, existed as a rule of action to some degree at least in the breast of every magistrate in the empire, and tended to give efficacy to the existing laws for the protection of the persons and property of the subject. But when the administration of the law became corrupt, the moral influence of such principles ceased to exist. The emperors, therefore, importuned by the constant complaints of the provincials, found it necessary to declare, in express terms, what were the true principles of justice, and what were the duties of those to whom the administration of the laws was entrusted; which has occasioned the reigns of the latter emperors to be distinguished, like that of Charles the Second in England, "as the æra of good laws and bad government[1]."

[1] See Blackst. Comm. iv. p. 439, and Fox's History of the Early Part of the Reign of James the Second, p. 22.

BOOK THE SECOND.

OF THE LAWS AND INSTITUTIONS OF THE FRANCS, GOTHS, AND OTHER BARBARIAN TRIBES WHICH ESTABLISHED THEMSELVES ON THE RUINS OF THE WESTERN EMPIRE.

CHAPTER I.

NATIVE LAWS AND INSTITUTIONS OF THE GERMAN TRIBES.

HAVING taken a view of the laws and manners which prevailed in the Roman provinces, I proceed to the next subject of inquiry, namely, the laws and institutions which were in use amongst the German conquerors before they established themselves in the Roman territory.

1. Distinction of persons.

At the period when the Germans first attracted the notice of the Romans as formidable neighbours, they were divided into freemen and slaves [1], and of the freemen some were distinguished as noble [2].

[1] Cæsar de Bell. Gall. lib. vi. Tacitus de Mor. Germ.

[2] Tac. de Mor. Germ. c. 11.

The nobles were of two classes, titular and official: the titular nobility was formed of the descendants of kings or distinguished generals[1]; the official nobility consisted of those who enjoyed civil or military offices in the state[2]. The slaves, also, were divided into two classes, absolute slaves and freed slaves: both were treated as fellow men; but the latter, though they enjoyed some advantages, were not considered as members of the republic[3].

The political institutions of the Germans, as handed down to us by Tacitus, exhibit little that is peculiar, being such as man in the first stages of civilization is prompted by his nature to adopt, and which have been found to prevail, with trifling variations, in every society of men whose early history has been recorded[4]. The several nations were divided into tribes, each of which had during peace a chief and subordinate magistrates, who acted as judges, or rather as judicial advisers, for settling their controversies. When the nation was engaged in war, generals and leaders in various stages of subordination were chosen by the

Freemen, their distinctions, ranks, &c.

[1] So I understand the expressions "insignis nobilitas," ibid. c. 13. "prout nobilitas," ibid. c. 14; and see ibid. c. 14, compared with the same expression, Tac. Ann. iii. 24. Tac. de Mor. c. 12.

[2] Tacitus says of the slaves: "Suam quisque sedem suos penates regit, frumenti modum dominus aut pecoris aut vestis ut colono injungit et servus hactenus paret," &c. Ibid. c. 25. "Liberti—non multum supra servos sunt." Ibid.

[4] See Robertson's America, Bruce's Abyssinia, &c.

nation at large to command in that war; but their authority of the leaders so chosen ceased with the circumstances which rendered their appointment necessary[1]. "From their hundred streams," says the bard of the Caledonians, "came the tribes to grassy Golgan Crona; their chiefs were before them; each strove to lead the war,—they led, but they were rolled away. From his own mossy hill, blue-shielded Trenmor came down; he led wide-skirted battle, and the strangers failed: around him the dark-browed warriors came, they struck the shield of joy; like a pleasant gale the words of power rushed forth from Selma of kings. But the chiefs led by turns in war till mighty danger rose; then was the hour of THE KING to conquer in the field[2]:"—which passage may be considered as giving a picture of the mode and the occasions of electing a German equally as a Caledonian war king.

[1] "In pace nullus est communis magistratus," &c. Cæsar. de Bell. Gall. lib. vi.; see also Tacit. Hist. c. 15; also Ammian. Marcell. xxviii. c. 5. Bede in describing the ancient Saxons says: "Non enim habent regem iidem sed satrapas—qui ingruente belli articulo mittunt equaliter sortes, et quemcumque sors ostenderit, hunc tempore belli ducem omnes sequuntur, et hunc obtemperant; peracto autem bello rursum equalis potentiæ omnes fiunt satrapæ." Hist. Eccles. V. c. 11. Turner's Anglo-Saxons, iv. p. 10. Ammian describes the Alans, who inhabited the Scythian deserts, and who became so formidable to the Romans in the time of Gratian, as choosing generals or *judices* in the same way." xxxi. 2.

[2] Ossian, duan 2.

Regal authority.

It is in the nature of man to endeavour to render permanent the authority with which he has been invested, though the occasion for its being granted may have passed away; nor are the people always unwilling to assist in the endeavour. The Germans afford an illustration of this remark. In the time of Tacitus, amongst some of the German nations, the chief duke or leader who had been chosen to conduct them in war, continued by consent or usurpation to retain supreme authority also during peace, enjoying the title and prerogatives of king [1]. This dignity, according to the prevailing custom, was given to none but nobles, that is, the descendants of kings or princes: and where the dignity of king had thus become permanent, the people still retained the right of electing the generals under whom they should serve in time of war [2].

Priests and judges.

The priests, who retained their offices for life, had high authority in their tribes: they alone could inflict punishment on a soldier, the severest

[1] Tac. de Mor. Germ. c. 7. 43. 44. Ammian in after times frequently mentions the kings of the German nations: particularly of the Alemans, lib. xviii. c. 2, &c.; Burgundians, xxviii. c. 5, &c.; Quadi, xxix. c. 6; generally, xxx. c. 3.

[2] "Reges ex nobilitate duces ex virtute sumunti." Tac. de Mor., Cæs. de Bell. Gall. lib. vi. c. 23; and see the Works of Abbé Mably, to. i. p. 379. These nobles are mentioned in the Theodosian Code, vii. 1. 9. &c. and in Ammian under the title of *regales*.

of which was *excommunication*; and they were the moderators of the general assemblies of the nation [1].

The chiefs, whose duty it was to settle as mediators the controversies that arose in their respective tribes, were chosen at the general assembly of the nation, and the people of the tribe appointed a certain number of companions or assessors to assist them in their office [2]. And from the Roman writers in the latter years of the empire applying to the generals of the German tribes the denomination of judges, we may assume that at this time it had become usual to unite the supreme civil and military authority in the same person [3]. If the chief or judge were unable, by the exercise of his influence, to settle the controversy, the parties were left to decide the quarrel by a resort to arms [4].

Each of the kings or princes of the German tribes, in like manner as had been the custom in the Gallic nations prior to their reduction by the Romans, was attended by a number of chiefs and elders of the nation, and by a chosen few called his com-

Council of the kings and princes.

[1] Tac. de Mor. c. 7. "Sacerdos apud Burgundios omnium maximus vocatur Sinistruset est perpetuus; obnoxius discriminibus nullis ut Reges." Ammian. Marcell. xxviii. c. 5.

[2] Tac. de Mor. c. 11. Cæs. Bell. Gall. lib. vi.

[3] V. inter alia, Ammian. Marcell. xvii. c. 13. p. 139.

[4] See Velleius Paterculus, ii. c. 118. § 1.

panions[1]; these were his counsellors, and assisted him to decide on less weighty public concerns. But before a predatory excursion was undertaken, in which the cooperation of the nation at large would be required, or a change of habitation was resolved on, or any other measure was adopted, for the success of which unanimity was requisite, it was usual to collect the general sense of the nation: and for the decision of such matters a general assembly was held once a month, at the change of the moon, or oftener if occasion required[2]. At these assemblies *the people* neither proposed the subject, nor joined in the debate; the king, chiefs, and elders, or grave men, according to their rank or merit, severally delivered their opinions to the whole collected body. No one, however high in authority, attempted on these occasions to command. The question was never a matter of intricacy; if the counsel of the speaker were approved, the people beat their arms together,—their disapprobation was expressed by murmurs[3]. It was at these assemblies also that

General assemblies of the nation.

[1] "Comites," Tac. ubi sup. Of the same custom amongst the Gauls before their subjection to the Romans, see Cæs. de Bell. Gall., and Polybius, ii. c. 17.

[2] Commodus, on making peace with the Quadi and Marcomanni, stipulated that they should not hold their assemblies oftener than once a month. Dion. Cass. cap. lxxii. p. 817.

[3] Mr. Gibbon, c. ix, note 45, and the Abbé de la Bleterie, and many others, fol-

accusations for offences which were visited with the punishment of death were determined: probably because this tribunal alone could have enforced, without resistance, a sentence for depriving a warrior of his life; and because the severity of the punishment would not shock or alarm the minds of the community when, by a public trial, all had been made acquainted with the enormity of the offence.

2. Laws and customs.

The laws, or rather customs of the Germans, with regard to private rights, were few and simple. Each of the various tribes composing a nation occupied, sometimes one, sometimes another portion of the common territory. This portion was divided among the members of the tribe, according to the merit of the individual or the number of his family. Hence as individuals arrived at distinction, or their families increased or diminished, new divisions of their lands, at least partially, must have continually taken place; nor were the whole of the lands which the tribe chose to call their own dis-

lowing Grotius, change *pertractantur* in the passage alluded to, into *prætractantur*: a change wholly unnecessary, and which would totally destroy the harmony which existed between the general assemblies of the Germans when inhabiting the north of Europe, and of the same people when settled in the south; besides *pertractare* is the word used to express the same mode of proceeding in the prefaces to the laws of the Barbarians and *prætractantur*, as Brotier has observed, *is not a Latin word.*

tributed[1]. The land which was set apart for tillage must have been divided annually, for the Germans never farmed the same land for two successive years[2]; a practice which, with some of the tribes, was adopted from motives of policy as well as of convenience. The Germans had no towns, nor even connected villages; their houses were all built apart from each other, and with a considerable vacant space surrounding them[3]. Every son, when of full age, was presented with arms at a general assembly: from this time he was emancipated from the authority of his parents, and became a member of the commonwealth, in which capacity he would immediately receive a share of the lands occupied by his tribe[4]. Frequently, therefore, all the sons, generally the elder, would be provided for before the death of the father; and the younger in the way of substitution, would commonly succeed to a part at least of the allotment which had been enjoyed by the parent: a practice from which the custom called *borough English* may possibly have originated. In such a state of society, land of course could not have been the subject of individual ownership; indeed it is

[1] Tac. de Mor. Germ. xxvi., and see Diodor. Siculus, lib. v. p. 311 and 316.

[2] "Arva per annos mutant." Tac. de Mor. c. 26. "Colunt discreti ac diversi ut fons ut campus ut nemus placuit." Ibid. c. 16. et Cæs. de Bell. Gall. lib. vi.

[3] "Ante hoc pars domus mox reipublicæ." Tac. de Mor.

recorded, that the only property of the wandering German was his flocks and herds, stock of corn, and arms[1]: to this property the sons succeeded on the death of the father; and if there were no sons, the brothers, uncles, or other nearest male relations[2].

Offences.

Of the other customs which prevailed amongst the Germans, the most remarkable is, that all injuries up to deliberate murder were compensated by the delivery of a certain quantity of cattle or other property; which in case of murder was claimed by the family or clan of the deceased, so that it became the interest as well as the duty of the relations of the deceased to prosecute the murderer. And though this custom has been considered as peculiar to the Germans, the early

[1] "Armentorum numero gaudent, eæque solæ et gratissimæ opes sunt." Tac. de Mor. c. 5. Ibid. c. 25.

[2] I assume that females took no share in the succession, from brothers and uncles alone being mentioned as succeeding in default of *filii*. Tac. de Mor. c. 20; and because the same author mentions, "that females never brought any dowry to their husbands." Ib. c. 18. This custom may be traced in the laws of the Burgundians, tit. li. l. 3.; and of the Angles and Werini, tit. v. l. 6 and 7; which give the land, slaves, and money to the sons, and the female ornaments only to the daughters. Nor was the custom of excluding females peculiar to the Germans; omitting numerous other instances, it prevailed amongst the early Romans, in regard to those of the same degree; and amongst the Armenians until abolished by Justinian. Novell. Just. xxi. pr.

existence of a similar custom may be traced in the Roman institutions [1].

Divination.

The Germans, like other rude nations, resorted to divination [2] in matters of serious import, in private as well as in public life. Their mode of consulting the fates was extremely simple; a twig of a fructiferous tree was cut into small pieces, each of which was marked; they were then thrown promiscuously on a white garment, and the answer was collected according as they presented themselves, on being drawn out with certain formalities: the priest officiated when the matter was of public importance, and added to the solemnity by offering prayers and supplications. The neighing of certain sacred horses kept by them was religiously observed, as a means of augury or divination. Battle, also, was resorted to by the Germans as a means of ascertaining the judgment of the Deity; thus, when engaged in a doubtful war, they compelled a captive of the enemy to fight with one of their own nation, and from the event of the duel formed a presage of the probable issue of the war [3].

[1] Florus, i. 9, 1; Instit. Justin. i. 25. § 9; Dig. xxvii. 1. 6. 17; Ibid. xxvi. 7. 47.

[2] "Auspicia sortesque ut qui maxime observant." Tac. de Mor. c. 7 and 10.

[3] Tac. de Mor. c. 10.

CHAPTER II.

ATTEMPTS TO INTRODUCE THE ROMAN LAWS AMONGST THE GERMANS.

Measures adopted in the time of Cæsar and Augustus.

As soon as the Romans under Cæsar and Augustus had gained a footing beyond the Rhine, they endeavoured, according to the policy which had been pursued in regard to the Gallic nations with such signal and complete success[1], to introduce their laws amongst the tribes over whom they had established their dominion. The Roman commanders, for this purpose, used their utmost endeavours to cause the natives to resort, for the determination of their differences, to Roman tribunals. But it was soon discovered by the native chiefs who had the independence and honour of their country at heart, that the character of the nation might be changed, and that the attachment and devotion of the people to their

[1] "Jam moribus artibus affinitatibus nobis mixti," says Tacitus, speaking of the Gauls. Tac. Ann. xi. 16. 17. & 24.

princes must soon become materially lessened, and might even be extinguished, if they should resort to the tribunals of foreigners, to decide according to the forms of law the controversies which had theretofore been decided through the mediation of their native chiefs, or by arms. When Quinctilius Varus, who had laboured with the greatest anxiety to bring about the establishment of the Roman laws and institutions, was congratulating himself on the incipient success of his schemes [1], Arminius, a prince of noble descent, whose tribe was then held in subjection by the Romans, and who had himself ten years before accepted from Augustus the title of a Roman citizen, pointed out to his countrymen, and the chiefs of the neighbouring tribes, the chains that were ready to be imposed, and the necessity of breaking them by a great and vigorous effort. A general rising of the barbarian hordes was the result: the unsuspecting Varus was surprised at Paderborn, the seat of his government, and his legions were utterly destroyed. Such was the rancour which the chiefs had inspired against those whom they considered their most dangerous enemies, that the Germans, having taken captive a lawyer who possibly may have acted as advocate or assessor in one of the hated tribunals, they first cut out his tongue, then

[1] Velleius Paterculus, ii. c. 118.

sewed up his mouth, and in this wretched condition taunted the miserable sufferer, saying, "at length we have deprived you of the means of hissing[1]."

Subsequent intercourse between the Romans and Germans.

From the reign of Augustus, the Romans apparently ceased to entertain any hope or even desire of establishing any permanent dominion in Germany beyond the banks of the Rhine and the Danube. Each successive emperor, particularly Severus, Probus, Constantine, and Valentinian, endeavoured to secure the frontier provinces from depredation and insult, by establishing fortresses and castles on the banks of those rivers, and by establishing a chain of forts, lines, and defences, from the one river to the other. These defences were manned and defended by the frontier militia, in the manner described in the preceding Book. From the time the Romans gave up their views of conquest, the Romans and Barbarians were led by degrees into habits of intercourse: and at times we find the Romans leagued with some of the German tribes on the borders, in temporary harmony, for mutual defence against the predatory invasions of the migratory tribes. With some of the German nations a lasting connexion was formed: the Batavians in particular remained, with some intervals of interruption, the

[1] Velleius Paterculus, ii. 117 and 118; Florus, iv. c. 12 and 36, 37.

faithful allies of the Romans, until they became incorporated in the confederacy of the Franks, about the reign of Valentinian. From the time of Augustus also, a communication was kept up by the Romans by means of embassies with the remote nations of Germans [1], to the very shores of the Baltic, and numbers of the wandering tribes were from time to time placed as auxiliaries on the Roman territory [2]. Such indeed was their character for scrupulous and unshaken fidelity, that it became a practice with the emperors [3] to enroll in their body guard a considerable number of Germans: Constantine and his successors recruited the legions from the Gothic and other German tribes.

By these means the Germans, and particularly those tribes which bordered on the confines, before their final settlement in the provinces, became familiar with the Roman laws and institutions. The military evolutions and tactics of the Romans soon became the objects of their imita-

[1] Thus, in the time of Nero or of Claudius, an embassy was sent from the remote tribe of Frisians. Sueton. vit. Claud. Tac. Ann. i. c. 13. 54. from the Lygii, in the time of Domitian. Dion. Cass. lxvii. p. 761.

[2] *Ante*, p. 50. Valens permitted the whole tribe of Thuringians to settle in Thrace, A.D. 376. Ammian. Marcellin. xxxi. c. 5.

[3] In the time of Galba, Sueton. Galba, c. xii. and xx. Vespasian, Mascou, iv. 26. Maximin. ib. v. c. 30. Constantine, Ammian. xv. c. 5. Gratian, Gibbon, vol. iv. p. 300, &c.

tion; and that rooted aversion which originally existed amongst the German to the political and judicial institutions of the Romans, was gradually in some nations eradicated, in others materially mitigated.

Tac. Ann. ii. 45.

BOOK THE THIRD.

OF THE SETTLEMENT OF THE GERMAN NATIONS OR BARBARIANS[1] IN THE ROMAN PROVINCES, AND OF THE LAWS AND INSTITUTIONS ESTABLISHED BY THEM AFTER THEIR SETTLEMENT.

CHAPTER I.

SETTLEMENT OF THE BARBARIANS IN THE ROMAN PROVINCES, AND KINGDOMS ESTABLISHED BY THEM.

The Francs.

THE *Francs*, who make the most considerable figure in the history of modern Europe, were originally a confederacy of German tribes inhabiting the district lying between the Lower Rhine and the Weser. Pharamond is the first of their kings who is noticed in history[2]. Clodion, a son or relative of Pharamond, next succeeded to the throne; and under him the Francs, about the year 440, established themselves in the northern parts of Gaul, in the vicinity of Cambray. Merovée, the suc-

[1] From this time I have classed the invaders under the general name of *Barbarians*, a name which they were not ashamed to give to themselves long after their settlement in the south. See Du Bos. Hist. Crit.

[2] Mascou, x. 39, &c.

cessor of Clodion, taking advantage of the defenceless state in which the provinces were left by the Romans, on whom the Germans, Huns, and Sarmatians were pouring from all quarters, added without much opposition part of Alsace, Picardy, Artois, Flanders, and Normandy, to the dominions he received from his predecessor. This monarch is celebrated for having largely contributed to the defeat of Attila, and the 500,000 Huns who had inundated the richest portion of Europe. Chilperic, the succeeding king, added little to the dominions he received from his father: but Clovis, the grandson of Merovée, in the year 485, by the defeat of the patrician or consular Syagrius [1], who, still as a tributary of the Roman emperor, held the country about Soissons under subjection, finally exterminated the Roman authority in the Gauls. The Armoricans, who appear to have established a kind of republic in the western districts of Gaul, yielded, as it would seem, a willing submission to Clovis. This enterprizing monarch, being now at the head of a numerous and warlike population, and master of an extensive and fertile territory, turned his victorious arms against the tribes of Germans who had established themselves in the eastern parts of Gaul, and in those parts of Germany which bordered on the Rhine. The *Thuringians* or *Angles*

[1] In Greg. Turon. lib. ii. c. 27, he is called "Romanorum *Rex*."

Thuringians or Angles, and Werini.

Alemans or Swabians.

Burgundians.

and *Werini*, and *Alemans* or *Swabians*, were soon reduced to the condition of dependent states; and partly by force and partly by intrigues, Clovis compelled Gondebald, king of the *Burgundians*, to become a tributary of the Francic nation. Clovis next achieved the conquest of Aquitaine, which had been ceded by the emperor Honorius to the Visigoths; though, on his defeat at the battle of Arles, he was compelled to relinquish to Theodoric the Great this part of his conquests. Clovis also, shortly before his death, put to death the king of the Ripuarian Franks, and also Chararic and Ragnacar, who were kings or chiefs of other tribes of Franks, who had established themselves in French Flanders and the northern provinces of France, and thus became master of a territory exceeding in extent the present kingdom of France.

Visigoths.

The *Visigoths*, upon being driven from Aquitaine by the victorious Franks, settled in Spain,

[1] The *Thoringi*, whom Gregory of Tours, ii. c. 27, mentions to have been conquered by Clovis, are by some supposed to have been a tribe called *Tungri*, who were sent against him by the Romans. See the second volume of the French Historians, by Dom. Bouquet, p. 175. Probably, however, they were the same Thuringians whom Thierry, the first king of Austrasia, reduced, A. D. 520; at which time their territory was incorporated with the monarchy of the Franks. See Gregor. Turon. iii. c. 7 et ibid. ii. c. 30.

[2] Greg. Turon. lib. ii. c. 40, 41 and 42.

where they founded the Spanish kingdom of the Visigoths.

Ostrogoths. In Italy, Theodoric the Great having vanquished Odoacer, king of the *Heruli*, the first barbarian king of Italy, established, in the year 488, the Italian kingdom of the *Ostrogoths*, but which was shortly afterwards overthrown by the arms of Belisarius and Narses, the generals of Justinian.

Saxons and Frisons. About the time that the Francs settled in Gaul, the *Saxons* established themselves in Brunswick, Holstein, the mark of Brandenburgh, and the adjoining countries, which had been deserted by the tribes which emigrated to the south. The Saxons retained their independence until reduced by Charlemagne; the *Frisons* appear to have attached themselves to the fortunes, and to have shared the fate of the Saxons.

Lombards. In the succeeding century, namely, in the year 568, the Lombards, another German tribe, under Alboin their king, founded, in the north of Italy, the barbarian kingdom of Lombardy.

Second empire of the west. Pepin le Bref, the son of Charles Martel, who from a mayor of the palace elevated himself to the throne of the Francs, in the year 768 by the consent of the chief men of the nation, devised by will the sovereignty of the Francs to his sons Carloman and Charles. The former died a few years afterwards, when Charles, who is so deservedly celebrated in history under the name of Charlemagne, succeeded to the undivided sovereignty. This mo-

march, after a succession of obstinate and bloody conflicts, reduced the Saxons under his dominion, and pushed his victorious arms to the shores of the Baltic. He also dethroned Desiderius, king of the Lombards, and incorporated Lombardy with his dominions; and having extended his empire to the banks of the Ebro on the south, and to the Vistula on the east, he was consecrated emperor of the west by Pope Leo the Third, in the year 800.

Anglo-Saxons.

The provinces of Britain were deserted by the Romans in the beginning of the fifth century. From this time, for a period of about forty years, the inhabitants, left to their own government and resources, sustained a harassing warfare with the Picts and Scots, who were continually endeavouring to gain a footing in the southern parts of the island. About the year 449, parties of *Saxons*, *Jutes*, and *Angles* made a descent upon the island [1]. These Barbarians were at first welcomed, if they had not been invited to the island, and their services were implored to drive back the *Picts* and *Scots*, who were more than a match for the peaceful and enervated Roman Britons. The foreigners gladly accepted an employment so congenial to their ferocious character and warlike habits [2]. Their efforts to

[1] Bede, Hist. Eccles. i. c. 14—16; Gibbon, c. xxxviii. and Lingard, vol. i. p. 91.

[2] Ammian always mentions the Saxons with the greatest dread; and see the testimony of Julian, Zosimus, Procopius, and Orosius, as to the ferocity

rid the country of the invaders were crowned with success; but having been joined by their countrymen in considerable numbers, they turned their arms against the natives whom they had been called in to protect. After an obstinate contest of nearly one hundred and thirty years' duration, during which the best parts of the island experienced all the miseries of intestine war, the Saxons and their allies finally established themselves in Britain, and formed the separate kingdoms of Kent, Northumberland, East Anglia, Mercia, Essex, Sussex, Wessex, which are known by the name of the Saxon heptarchy [1]. These several kingdoms became, in the year 827, virtually united under Egbert, king of the West Saxons, though Mercia, East Anglia, and Northumberland were still governed by separate but dependent kings [2]. From the time of Egbert, England was harassed by the invasions of the Danes, who succeeded in placing several kings of their nation on the throne of England. However the Saxon line was restored in the person of Edward the Confessor, who became king of all England in the year 1041.

of the Saxon character, in p. 90 of the 1st volume of Lingard's History of England, and of Salvian, Fortunatus, and Eginhard, in the 4th vol. of Turner's Hist. of the Anglo-Saxons, p. 3.

[1] The kingdom of Northumberland was occasionally divided into two, *Bernicia* and *Deira*. Rapin, vol. i. p. 47.

[2] Rapin, vol. i. p. 64, et seq.

The cultivated parts of the countries over which these nations of barbarians established their dominion were, at the time of their being first occupied, thickly studded with cities, towns, and villages[1], inhabited by a numerous population of Roman citizens, all governed exclusively by the laws, and living under the institutions which have been described in the preceding book; it would therefore naturally happen that the native customs of the barbarians should be considerably affected by their intermixture with the comparatively polished inhabitants of the conquered countries. It has been conjectured, indeed, and with considerable appearance of truth, that the arts and institutions of the Romans were less deeply rooted in Britain than in Spain and Gaul[2]: but when it is remembered that the Roman laws continued in use in this island at least from the reign of Claudius[3] until about the time of the taking of Rome by Alaric, a period of 360 years, during which time those laws were administered by Papinian, Paullus, and Ulpian, three names the most famous in

[1] See particularly the description given by Ammian of the state of Gaul in his time, lib. xv. c. ii. p. 78, et seq.; Gibbon, vol. i. p. 78. Of the state of *Britain* at the time of the descent of the Saxons, see Whitaker's History of Manchester, book i. c. 8. and c. 11.

[2] Gibbon, vol. vi. p. 394.

[3] William of Malmsbury, lib. i. c. 1. and other writers, affirm that the Roman laws were established by Julius Cæsar; but the laws of the Romans cannot have been in general use prior to the reign of Claudius.

the history of Roman jurisprudence [1], and others of almost equal celebrity; and that the laws of the Romans were more or less interwoven in the municipal regulations of about 140 cities and towns [2], dispersed throughout the island; it is impossible but that at the time of the descent of the Saxons the common law of Britain must have consisted principally, if not entirely, of the laws which the Romans had introduced into the island [3].

[1] Selden, Dissert. ad Fletam, § iii. Dion. Cass. lxxvi. p. 868. edit. Hanoviæ, 1606, the edition which I have commonly referred to.

[2] Whitaker's Hist. of Manchester, book i. c. viii. § 1. There were thirty-three cities particularly distinguished by their importance. On this subject see Gibbon, vol. v. p. 364.

[3] See this subject discussed in Selden's Dissertation on Fleta, § iv. et seq. Fortescue, De laudibus legum Angliæ, c. 17, after describing the several revolutions which had taken place in Britain down to his time, proceeds thus: "And in all the times of these several nations, and of their kings, this realm was still ruled with the *self same* customs that it is *now governed withal*, which, if they had not been right good, some of those kings, moved either with justice, or with reason or affection, would have changed them, or else altogether abolished them, and *especially the Romans*, who did judge all the rest of the world by their own laws." It would be idle to point out the mistakes and absurdities which are embodied in this and the succeeding passages of that chapter.

CHAPTER II.

NATURE AND SPIRIT OF THE BARBARIAN CONQUESTS.

To what extent the barbarians suffered the inhabitants of the countries which they conquered to retain their freedom, their laws, and their property, has been the subject of controversy with the ablest writers[1]. Circumstances would of course most materially influence the barbarians in this respect. It may be discovered that the Burgundians, Goths, and Francs[2], at least in their settlements under Merovée and Clovis, however,

[1] The most violent supporters of the two extremes are the Abbé Du Bos, who asserts the almost absolute adoption of the Roman customs, and the Count de Boulainvilliers, who seeks to establish that the barbarians exterminated the Romans and their laws: the latter, it may be remarked, seldom quotes authorities. The Abbé Mably, in his Observations sur l'Histoire de France, takes rather a middle course: but he is warped in his judgment by a constant desire to expose Du Bos, in which he is not always successful. Montesquieu's acute and pertinent observations on this subject, in his Esprit des Loix, must always be read with admiration.

[2] See particularly Gibbon, c. xxxviii. of the reduction of the Armoricans.

savage and relentless their conduct might be towards the enemies who opposed their progress by arms, offered themselves to the peaceable provincials as protectors, rather than as conquerors, and very soon mixed themselves with the old inhabitants, on terms of intimacy and friendship[1]; indeed it is not improbable that in many instances they had been invited to assist in throwing off the Roman yoke, from the provincials, under which, as I have before had occasion to notice, they were most grievously oppressed. The Salians, the most famous of the Francic tribes, glory in the renown, not of being the conquerors or exterminators of the provincials, but in having released them from the Roman yoke[2]; though it is remarkable that such was the veneration which was paid to the majesty of the imperial name, that Clovis, when at the height of his victories, was proud to accept

[1] Orosius, who lived in the 5th century, says, "Post hoc quoque continuo barbari execrati gladios suos ad aratra conversi sunt, residuosque Romanos ut socios et amicos fovent." Lib. vii. c. 28. This is also evident from the Laws of the Barbarians. See particularly Leg. Ripuar. tit. 61, &c.; Leg. Sal. tit. 43, 44.; Longob. ii. tit. 56. Edict. Theod. et Leg. Burg. tit. xiii. &c.

[2] See the preface of the Salic Law: "Gens Francorum inclita auctore Deo condita.—Hæc est enim gens quæ parva dum esset numero fortis, robore et valida, durissimum Romanorum jugum ceviculis excussit pugnando, &c. This preface was probably prefixed in the time of Clotaire the second.

from the emperor Anastasius the name and insignia of a Roman consul[1], and Dagobert, as if claiming the same distinction, assumed the title of King of the Franes and Prince of the Romans[2].

There is great reason to believe that the Barbarians, who at first had a great aversion to towns, as places of residence[3], pretty generally permitted such of the original institutions which prevailed in the cities and towns, as the provincials were desirous to retain, to continue in force; and that they suffered all those who were engaged in trades or manual occupations to carry on their employments undisturbed. There certainly was, from the first, a very large proportion of Romans amongst the inhabitants of the cities[4]. It appears also that a peculiar and exclusive jurisdiction was permitted to be exercised by the magistrates and council of particular cities. In the laws of the Goths, *curiales* are expressly mentioned[5]; so are the civic magistrates, called *assertores pacis*[6]. The laws of the Burgundians notice magistrates of cities, as distinguished from those of districts[7]. Gregory of

[1] Greg. Turon. lib. ii. c. 38.

[2] "Dagobertus, Rex Francorum et Romani populi princeps." Vit. Beat. Martin. Duchesne, tom. i. p. 655.

[3] Mascou, lib. x. ault. xvi. c. 36.

[4] V. int. alia Marculf. Form. lib. ii. form 8. "et omnis *populus* ibidem commanentibus tam Franci, *Romani*, Burgundiones," &c.

[5] Edict. Theod. c. 27. and 69. Leg. Visigot. v. 4. 19. &c.

[6] Leg. Vis. ii. 1. 16.

[7] "Tam Burgundiones quam Romani civitatum vel pago-

Tours mentions the *judicium civium* as distinguished from the judgment of the *mallus*, or ordinary court held by the count for the administration of justice[1]. The formularies of Anjou[2] notice magistrates chosen by the citizens: those of Sirmond[3] mention the *curia publica* of the city. In those of Lindenbroc, not only the *curia publica*, but the magistrates called *defensores civitatis*, are expressly mentioned[4]; but none of the oppressive regulations, which had prevailed under the Roman system of government, at least as far as the free inhabitants were concerned, are to be traced in the laws of the Francs, or other continental nations.

rum comites vel judices deputati etiam militantes." Præm. Leg. Burg. et Addit. 2. 7 § 10.

[1] Greg. Turon. lib. vii. c. 47.

[2] Form. Andegavenses in tom. iv. of the Histor. Franc.

[3] Form. Sirmondicæ in Baluze, tom. ii. p. 481.

[4] Form. ed. Lindenb. 58. From the time of Louis le Gros (whose reign commenced A. D. 1108), numerous charters were granted to cities and towns throughout France, by which privileges were conceded similar to those which were enjoyed by the few cities that had retained their ancient institutions down to that time. Beaumanoir, c. L. p. 268, in whose time these institutions had been much improved, particularly by many beneficial regulations introduced by St. Louis, describes the condition of these cities, their councils, and courts, and municipal offices: they were in fact little republics. See the authorities cited by the Abbé Mably, Observations, &c. tom. ii. p. 309, et seq. Mably, in his desire to confute the Abbé Du Bos, tom. ii. p. 524, et seq. has gone much too far in denying the prior existence of communities.

With regard to the Anglo-Saxons, many persons will recognize in their *Gilds* a continuance, or an imitation of the companies established in the Roman cities, more especially as many of the old restrictions on the inhabitants, in regard to the disposal of their property and the like, were continued or imposed by these conquerors[1].

Conduct of the barbarians as to private possessions.

Goths and Burgundians.

The conduct of the GOTHS and BURGUNDIANS in regard to the *private possessions* of the provincials, unless when provoked to rigorous or vindictive measures, was in a high degree prudent and conciliatory. The provincials, as we have seen in the preceding book[2], were bound, whilst under the Roman dominion, to afford *hospitality* to the Roman armies when sent amongst them, according to fixed and determinate rules. The Goths and Burgundians, who performed the same office of protection from foreign aggression which the provincials had formerly experienced from the Roman legions, claimed a similar recompense; but instead of mere temporary *quarters*, they claimed, by *right of hospitality*[3], a proportion of the lands and slaves of the provincials to be assigned to them *in ownership*. This proportion was generally two-thirds of the land, and one-third of the slaves; the re-

[1] Turner's Anglo-Saxons, iv. p. 301; and see Domesday passim. Heywood on Ranks, and Brady on Boroughs.

[2] Ante, p. 24.

[3] *Hospitalitatis jure.* Leg. Burgund. tit. iv.

maining one-third, or other settled proportion of the land, and two-thirds of the slaves, was left to the former proprietors [1]. On the first occupation of the newly acquired territory, when the soldiers were liable to constant calls to arms, each individual took up his abode with the person to whom he was assigned, and enjoyed his undivided two-thirds in common with his host. The superintendence of the culture and management of the land was imposed upon the host, who, for this purpose, was permitted to retain the largest proportion of the slaves: but when the barbarians had become firmly settled with their wives and families, the lands and slaves were parted between the barbarians and Romans, according to their respective proportions: and from this time each party enjoyed in severalty their distinct and separate shares [2].

[1] The Burgundians claimed one half only for those who followed the first settlers. Leg. Burg. tit. liv. § 11. This half was taken, I should suppose, from the one-third which was left to the provincials on the original partition.

[2] V. Leg. Vis. x. 1. 8. and 16. Leg. Burgund. tit. xiii. tit. liv. § 1. and tit. lv. Addit. ii. tit. 11. Marii Avent. Chron. ad A. D. 456, quoted by Montesquieu, Esprit des Loix, liv. xxx. c. 7. and Du Bos, ii. p. 555.—Selden, Op. Lond. 1726, tom. iii. p. 384, quotes from Cassiodorus a formula of the appointment of an Ostrogothic Count, which exhibits a picture of the state of the Ostrogoths, and probably of the other barbarians, before they had fixed themselves in any settled habitations: "Theodoricus, Rex, &c. cum Deo adjuvante, sciamus Gothos vobiscum habitare permixtos, ne qua inter *consortes* ut assolet indisciplinatio nasceretur, necessarium duximus illum sublimem vi-

Francs. No violent alteration was made by the FRANCS in regard to the general condition of the country. At the period when the confusion of conquest had subsided, and the Francs were settled in the extensive empire which they formed, we find that a considerable portion of the country was still divided in the same manner as during the dominion of the emperors, into small farms, or *mansi*, sufficient for the support of a single family[1]. There

rum bonis moribus hactenus comprobatum ad vos comitem destinari, qui secundum edicta nostra inter duos Gothos litem debeat amputare. Si quod etiam inter Gothum et Romanum natum fuerit fortasse negotium, adhibito sibi prudente Romano certamen possit equabili ratione distringere; inter duos autem Romanos Romani audiant quos per provincias dirigimus cognitores; ut *unicuique sua jura serventur*, et sub diversitate judicum una justitia complecteturuniversos. Vos autem Romani," the king proceeds, "magno studio *Gothos* deligere debetis, qui universam Rempublicam *per bella defendunt*." See also the form of the appointment of a *Dux* for defence of the frontier provinces, ibid. p. 386.—Gibbon (vol. v. p. 361. vi. p. 354.) and other modern writers appear to have overlooked the *hospitalitatis munus* of the Romans, which so clearly explains the settlement of the barbarians *as guests*, and the division of the lands, (*sortes*) between the barbarians and natives. Montesquieu, who "en lisant les codes trouve partout Cesar et Tacite," thinks that the system pursued by the Burgundians and Visigoths may be explained by their love of hospitality, as described by Tacitus. Esprit des Lois, liv. xxx. c. 2 and 9.

[1] *V. ante*, p. 33. Histor. Franc. to. iv. p. 539. "*Mansus* villula est coloni unius habitationi destinata, cum certo agri modo quantum ille arare potest." Note of Bignon, same page; and see p. 669, et seq.; et vide Form. edit. Lindenbrog. 52.

was, also, at this time a description of Romans called *Romani tributarii*[1]; another description, denominated *Romani possessores*, who are described as being owners of property in the country where they lived[2]. There seems to be no reason to doubt that the *tributarii* and *possessores*, mentioned in the Francic codes, corresponded to the *coloni* or *tributarii*, and *domini* of the Romans, whom I have described in the first book. Montesquieu, indeed, who had not, as it would seem, any definite notion as to the condition of these tributarii, calls them "especee de *serf* ou d'*affranchi*[3];" but it is to be remembered that they are mentioned in the Salic code under the title de homicidiis *ingenuorum*[4]; and that in the law of the Alemans, the farmers occupying the lands of the church, who are called *coloni*, and whose condition was similar to that of the coloni of the Francs, are denominated *liberi*, which word appears to be used throughout the codes as synonymous with *ingenui*. There is no evidence as to the manner in which the *Francs* adjusted the proportion of the lands and slaves which they took to themselves; but from the facts above mentioned, it is evident that they did not make an indiscriminate seizure, but left to some portion of the provincials a considerable part of their lands[5].

[1] Leg. Sal. tit. xliii.

[2] Ibid. tit. xlix. § 15. edit. Heroldi.

[3] Esprit des Lois, xxx. c. 25.

[4] L. Sal. tit. 43. § 8.

[5] The lands which the *Salic*

Anglo-Saxons.

In the history of the Anglo-Saxons, no trace of such a division of land as took place on the continent can be discovered, nor until a late period was any consideration paid to the ancient landed proprietors; on the contrary, the savage and rapacious Saxons appear to have seized the whole of the land themselves, and to have reduced to slavery, or forced into the remotest corners of the island, or driven into exile[1], the greatest part of the landowners, which class of men, as the possessors of the only species of property which appears to have been coveted by the Saxons, were the marked objects of the hostility of the conquerors. It was only in the towns, the inhabitants of which being engaged in commerce, would not excite the resentment or fear of the conquerors—that the ancient usages and laws of the nation were preserved. The cultivators of the soil, both those who were denominated *ceorls* and answered to the tributarii of the Francs, and those who were in a state of servitude, as they were necessary to the conquerors,

Francs took to themselves are called, in their law, *Terra Salica*, and were subject to distinct laws of inheritance, as I shall have occasion to notice in a future page.

[1] See Gildas, in Gale. p. 16, and Bede. See also Gibbon, vol. vi. of the settlement of the fugitive Britons in Britanny. By the laws of Edward the Confessor it was declared that any Britons, who should come into the island from Britanny, then called Armorica, should, in respect of their descent from the ancient Britons, be considered as English citizens. Wilkins, Leg. Angl-Sax. p. 206.

would, in all probability, be compelled or invited to remain on the land to which they were attached; and, as they would merely have to perform the same services for the Saxons which they had performed for their former masters, possibly they might not object to the change.

The conciliating, and, considering the defenceless state of the provincials, liberal conduct of the continental conquerors, joined to their seasonable conversion to Christianity, was productive of the happiest results. It not only facilitated the conquests of the barbarians, but also gave stability to their newly-formed kingdoms. The clergy indeed, who were then a most powerful body, must have been peculiarly interested in the success of the arms of Clovis, who, when Arianism was making rapid strides throughout Europe, had the merit of holding what was declared to be the orthodox faith. History has not recorded any serious attempts at revolt on the part of the native provincials on the whole continent of Europe; and we have the direct contemporary testimony of Salvian, priest of Marseilles, one of the fathers of the Christian church, that the provincials were infinitely more happy under the dominion of the Francs, the Huns, the Vandals, and the Goths, than they had been under that of the Romans[195].

[195] Salvian, p. 88. p. 90— at length by Mascou, book x. c. 41. The passages are quoted

CHAPTER III.

CODES OF THE BARBARIANS.

THE following are the principal codes that were compiled by the barbarians who formed settlements on the continent of Europe: The SALIC LAW, or law of the Salian Francs, whose original habitation cannot be precisely fixed; the RIPUARIAN LAW, or law of that body of Francs who, in the latter years of the empire, established themselves on each side of the Rhine, in the neighbourhood of Francfort[1]; the laws of the ALEMANS, or Swabians; the laws of the BAVARIANS; the laws of the BURGUNDIANS[2]; the laws of the THURINGIANS, or ANGLES and WERINI; the laws of the SAXONS; the laws of the FRISONS; the laws of the OSTROGOTHS; the laws of the

[1] "Ripuarios qui alias Ribuarii, a Ripa Rheni sic vocatos, et primum Romanis ad defensionem limitis adversus Germanos constitutos fuisse, nullus dubito." Et reliq. Eccardi de Ripuariis observatio, in tom. iv. of the French historians, p. 232.

[2] The Burgundians were originally a tribe of *Vandals*.

VISIGOTHS; the laws of the LOMBARDS; and the laws of the ANGLO-SAXONS.

The Salic Law.

It appears from the preface prefixed to the Salic law, that the first code which went by this name was reduced into writing by four princes or rulers of the Salic nation,[1] whilst the Francs yet remained pagans, and, as it would appear, before regal government was established amongst them. A code which by many is supposed to be the code (without the capitularies) which now goes by the name of the Salic law, was confirmed at various general assemblies of the nation, in the beginning of the fifth century; others are of opinion that the code which has been handed down to us was not promulgated until the reign of Clovis, who commenced his reign in the year 481. The Salic code was considerably altered by the successors of Clovis, and particularly by Charlemagne, which may account for the variations which occur in the four different manuscripts which have been preserved.

Salic law.

[1] The appellation Salic was assumed by a particular body of Francs long before the nation settled in Gaul, but the origin of the term has not been discovered. See tom. i. of the French historians, p. 579.

The question as to the antiquity of the Salic law is discussed in tom. ii. of the same collection, p. 649, 665, 666, and in tom. viii. of the Memoires de l'Acad. des Inscrip. p. 492; and on the same subject see Gibbon, c. xxxviii. note 36. Baluze and Lindenbroc have adopted the

The Laws of the Ripuarians, Alemans, and Bavarians.

Codes of the Ripuarians, Alemans, and Bavarians.

The laws of the Ripuarians, of the Alemans [1], and of the Bavarians, were reduced into writing, and promulgated in the form of codes, in the reign of Thierri, one of the sons of Clovis, about the year 511. Childibert and Clothair, successively amended and remodelled them; and Dagobert caused them to be revised by four elders or sages skilled in the law, by whom they were reduced into the form in which they are now presented to us [2].

Laws of the Burgundians.

Les Gombettes.

Gondebald, king of the Burgundians [3], compiled the code of the Burgundians about the year 500. Various additions were made to this code by

text as reformed by Charlemagne. The four texts of the codes, with most valuable notes, are to be found in the 4th volume of the splendid collection of the French historians, above alluded to, and which is to be rivalled, at no distant period it is to be hoped, by the intended national publication of our own much-neglected historians and codes.

[1] The Alemans or Swabians were reduced by Clovis, and their king slain, A. D. 496.

[2] Preface to the laws of the Francs, in tom. iv. of the French Historians, and Lindenbrogii Prolegomena.

[3] The kingdom of the Burgundians was incorporated with the monarchy of the Francs by the sons of Clovis.

Sigismund, his son and successor. The laws which composed this code were afterwards known by the name of "*les Gombettes*[1]."

Laws of the Angles and Werini, or Thuringians, of the Frisons, and of the Saxons.

Codes of the Thuringians, Frisons, and Saxons.

It cannot be stated with certainty when these codes were compiled. The codes of the Thuringians and Frisons are the most simple of all the Barbarian collections, and may therefore lay claim to considerable antiquity[2]; but it is probable that the laws of the Saxons were materially altered in the time of Charlemagne[3].

Laws of the Ostrogoths and of the Visigoths.

Edict of Theodoric.

The law of the Ostrogoths, or edict of Theodoric the Great, was compiled by Theodoric after he had expelled the Heruli, and completed the conquest of Italy, about the year 493.

Code of the Visigoths.

Euric, or Theodoric, king of the Western Goths, or Visigoths, who established themselves first in

[1] Lindenbr. Prolegomena, et v. Greg. Turon. ii. c. 33. Eccardi, not. in præfat. in Legi Burg. Histor. Franc. tom. iv. p. 255.

[2] In the code of the Frisons, there is this expression:—"Immolatur *Diis quorum templa* violavit." Fris. tit. xii. which would shew that it was compiled before the nation was converted to Christianity.

[3] See Esprit des Lois, xxviii. c. 1. and tit. xiv. and xvi. of the law of Saxons.

the south of France, and then in Spain, in the course of his reign, which continued from A.D. 476 to 485 of the common æra, caused a code of laws to be reduced into writing, for the use of his subjects. The person chiefly employed by this monarch in the above undertaking was Leo, his prime minister, who was one of the most eloquent persons of the time in which he lived, and was esteemed the first civilian of that age[2]. Alaric the Second, the son and successor of Euric, found the laws then compiled so insufficient, that, in the year 506, he caused Anian, a famous civilian, to compile, from the Theodosian code, a code of laws for the use of his subjects, which compilation went by the name of the *Breviarium Aniani*[3]. The succeeding kings, rejecting this compilation, continued to add to and improve the Visigothic code; and in the year 640 the code was so far rendered complete, that it was ordained that the Roman laws, that is, the Theodosian code, and *Breviarium Aniani*, should no longer have any authority in the kingdom of the Visigoths[4].

Breviarium Aniani.

[1] 466-84. Edin. Rev. xxxi. p. 95.

[2] Lindenbrog. Prolegom. Mod. Universal Hist. vol. xix. p. 394, note D. It is to be remarked, that the Spanish æra commences thirty-eight years before the common Christian æra. Petav. Ration. Temp. iii. part 2. c. 14.

[3] Terasson, Jurisprudence Romaine, p. 290.

[4] "Nolumus," says the law, "Romanis legibus sive alienis institutionibus amodo amplius convexari." Leg. Visigot. ii. 1. 9.

Egica, about the year 687, collected the laws of his predecessors, and having made some additional laws, formed the whole, with the assistance of his principal ecclesiastics, into the code which has been handed down to us, and which was confirmed at the sixteenth council of Toledo[1]. There is extant an ancient Spanish translation of this code, which is called the *Fuero Juzgo*. To this translation is prefixed an exordium, containing a selection of laws and canons, enacted at the different councils of Toledo, to regulate the mode of electing the king by the bishops, magnates, and people[2]. Fuero Juzgo.

Laws of the Lombards.

Rotharis, king of the Lombards, who reigned from the year 630 to 646, commenced the compilation of this code. His successors added various laws, but the principal part of the code which has been handed down to us was promulgated in the reign of Charlemagne, and of the emperors, Louis, Lothaire, and Conrad, his successors[3]. Code of the Lombards.

[1] Many of the laws which are contained in this code remained in force in Spain, and more particularly in Catalonia, until a late period. Mascou, xvi. c. 30. annot. xxvi. § 2.

[2] Edin. Review, vol. xxxi. p. 102. In the same work, p. 99 to 103, is contained a detailed account of the compilation of the Visigothic code.

[3] Lindenbro. Prolog.

Capitularies.

Capitularies.

Besides the additions which were made to these several codes, Childibert, Clotaire, Carloman, Pepin, and Charlemagne and his successors, down to the year 882[1], caused distinct laws or *capitularies* to be promulgated in different parts of their dominions, as occasion required. These Capitularies were of two classes, provisional and absolute.

Provisional.

The former were issued on some urgent occasion, or to meet some particular emergency; the latter

Absolute.

comprised such only as were confirmed at a general assembly of the nation[2]. Mably and others are of opinion, and the opinion is founded on strong authorities[3], that it was only the capitularies of this latter class that obtained the name or force of laws of the empire[4].

[1] See Hallam's Middle Ages, vol. i. p. 243.

[2] Mably, Observat. &c. tom. i. p. 387, &c.

[3] "Ut *populus* interrogetur de capitulis quæ in lege noviter addita sunt, et postquam omnes consenserint," &c. Capit. 3. ann. 803. &c.

[4] See, on the subject of the migrations of the Barbarians and of their laws, the Horæ Juridicæ Subsecivæ of Mr. Butler. In quoting this work, I cannot refrain from stating how much I am indebted to the writings and to the example of the intelligent and learned author.

Laws of the Anglo-Saxons.

According to the authority of Bromton [1], and others of our ancient historians, the first written laws which were promulgated in Britain were those of *Dunwallo Molmucius*, who was king of the Britons about the year 285 from the foundation of Rome. The same authors assert that Marcia, queen of Britons, about 80 years afterwards, promulgated a further code of laws, which from her name was called the *Mercian law* [2]. Gildas, it appears, translated the Mercian law, by whomsoever compiled, into Latin, and Alfred into Saxon; but these translations have not been preserved.

Laws of the Anglo-Saxons.

Merchenelage.

After the conversion of Ethelbert, king of Kent, and third Bretwalda or superior lord of England, he, at the instigation probably of the Christian priests who were brought into his dominions by his wife, with the consent of the nobles and wisemen of the land, and with the general approbation of the whole body of his Saxon subjects [3], promul-

[1] Bromton ap. Dec. Scrip. i. p. 956. Higden ap. Gale, 202. 214. &c.

[2] Nicholson, in his Historical Library, i. p. 87, ridicules this alleged origin of the Mercian law.

[3] "Rex Edelberthus," (says Bede, Hist. Eccles. ii. c. 5.) "inter cætera bona quæ genti suæ consulendo conferebat etiam decreta illa judiciorum, juxta exempla Romanorum cum consilio sapientum con-

gated the laws which go by his name. This took place about the year 596. Other kings of Kent, as Lothair, Edric, and Wihtred, also published collections of laws. The laws of these monarchs and their wise men scarcely extend beyond fixing the amount of the fines to be paid for wounds and acts of violence, which had become necessary, perhaps, in consequence of the great variation which must have taken place in the value of money and commodities.

West-Saxenelage.

Ina, whose code was the foundation of the *West-Saxenelage*[1], and Alfred, both kings of the West Saxons, the former of whom reigned from 688 to 728, and the latter from 871 to 901, with the assent of their nobles and wise men, enacted codes of laws, which, having been compiled when the nation was recovering from

stituit." Those of his laws which are extant are amongst Dr. Wilkins's collection.

In Mr. Turner's fourth volume of the History of the Anglo-Saxons, every thing relating to their laws and customs is collected. Indeed a general reference to that very accurate and comprehensive work might have been almost sufficient. Dr. Lingard, vol. i. p. 454-510, and Mr. Hallam, vol. ii. p. 374, et seq. have also each given an account of the Anglo-Saxon laws and customs, which must be considered as most valuable acquisitions to English literature.

It is much to be lamented that there is no English translation of the Anglo-Saxon laws; in many most material passages, what is set opposite to the Saxon text by way of translation is nothing but an unintelligible jargon.

[1] Bromton, 956-7. William of Malmsbury mentions the laws of this king as being known in his day, p. 14. 40.

the cruel and destructive wars by which it had been devastated; shew a progressive advancement in civilization. In these codes, the mode of deciding controversies by compurgation and ordeal is reduced to a system. Athelstan, who became monarch of all England about A. D. 937, also compiled some laws; and in his reign the collection entitled the Statutes of London[1] was promulgated. Edmund, the successor of Ethelstan, who reigned from 940 to 946, also promulgated laws which go by his name. Edgar, who reigned from 959 to 975, and Ethelred, who reigned from 978 to 1016, published additional laws.

Canute, the second Danish king, and first who gained a permanent authority, and who reigned from 1017 to 1035, compiled and promulgated a distinct code of laws, with the advice of his nobles and wise men. This code comprises a very great proportion of the enactments contained in the code of Edgar; in the additions which it contains, there is a spirit of moderation and humanity

[1] This collection is thus entitled, according to the translation of Wilkins: "Hoc est consilium quod episcopi et præfecti (Gerefan), qui ad curiam Lundinensem pertinebant, edixerunt, et juramentis confirmaverunt;" and so proceeds until the eleventh article, which is headed thus: "Undecimo, rex Ethelstanus præcepi episcopis meis et præpositis ac præfectis meis omnibus per totum regnum meum, ut ita pacem teneatis uti vobis constitui, *Ego* et *sapientes mei*," &c. Wilkins, p. 69.

which was scarcely to have been expected from a foreigner and a conqueror. The additional laws and customs introduced by Canute were known by the name of the *Danelage*. Besides the collections above mentioned, other laws were made at different times, particularly on the occasion of the treaties entered into between the different Saxon and Danish kings. The laws contained in these treaties chiefly relate to the fixing by what particular customs, whether those contained in the *Merchenelage*, the *West Saxenelage*, or *Danelage*, the inhabitants of particular districts were to be governed. Some of these treaties are to be found in the collection of Wilkins.

Danelage.

Leges Edwardi.

In the time of Edward the Confessor, each of these three distinct systems prevailed in different parts of the kingdom, namely, the *Merchenelage*, in the counties of Gloucester, Worcester, Hereford, Salop, Chester, Stafford, Warwick, and Oxford; the *West Saxenelage*, in the counties of Kent, Sussex, Surrey, Berks, Wilts, Southampton, Somerset, Dorset, and Devon; the *Danelage* in the counties of Essex, Middlesex, Suffolk, Norfolk, Hereford, Cambridge, Huntingdon, Lincoln, Nottingham, Derby, Northampton, Leicester, Buckingham, Bedford, and York, which then included Northumberland. However, the course and forms of justice were nearly the same in each of these systems, and they differed not so much in the de-

finition as in the punishment of offences [1]. Edward appears to have introduced such alterations and amendments in these several systems of law as were necessary for incorporating them into one general code. Edward also added many laws of his own; and the whole together were called by the name of the *laws of Edward*. These laws were well known down to the time of Bromton [2], who flourished, as it is supposed, in the beginning of the fourteenth century. No complete collection of the laws of Edward has reached our days, but the compilation published by Wilkins, which is of great antiquity, together with the principal part of the code which goes by the name of the laws of Henry the First, may be considered as containing nearly the whole of those laws. Edward did not succeed in completely abolishing the distinction between the three systems of law which I have above described, as traces of it are to be found in the code of Henry I.

There is this striking difference between the laws of the Anglo-Saxons and those which I have before enumerated, that they were written in the native language of the conquerors, which affords additional evidence of the state of degradation to which the inhabitants who were permitted to

[1] Spelman's Post. Works, 49. Heywood on Ranks, Introduction, p. xli.

[2] Bromton, p. 957

retain their lives and freedom, were reduced on the original conquest: in latter times, when the natives were admitted to rank with the conquerors[1], the Saxon had become the common language of the whole mass of the people.

[1] There appears to have been a considerable influx of Britons after the final establishment of the Anglo-Saxons. "Edwinus rex Nord Humbrorum" (says Bede), "cunctisqui Britanniam incolunt Anglorum pariter et *Britonum* populis præfuit, præter Cantuarios," &c. Hist. Ecc. ii. c. 5. Edgar, after directing that the Danes should be at liberty to choose their own law, and that the Angles should live under the laws which he and his wise men had framed in addition to the ancient laws, for the good of the whole nation, proceeds, according to the translation, thus: "Attamen sit utrinque consilium hoc commune toto populo, tam *Anglis* quam *Danis* et *Britonibus*, in quacumque terrarum mearum parte, ideo ut pauper et indigus possidere queant id quod juste acquisiverunt," &c. A Briton, or Welchman, who was possessed of five hides, was estimated equally with a *Thane*, so early as the reign of Ina, king of Kent. Leg. Inæ, § 24, Wilkins, p. 18. et v. Leg. Athelst. p. 71.

CHAPTER IV.

OF THE BARBARIAN KINGS, THEIR PREROGATIVES, COURTS, AND REVENUES.

THE royal authority among the *Visigoths*, who had long lived under regal government, was elective, but latterly the nobles, that is, descendants of those who had been elevated to this dignity, could alone offer the candidates [1]. The monarchy first established by the *Franks* appears to have been hereditary in the male line; those in nearest degree dividing the succession in equal portions, and each taking the title of king [2]. In their early history, Succession to the crown.

[1] "Trans Lygios Gothones regnantur." Tac. de Mor. Germ. c. 43. Gregory of Tours, iii. c. 30. states that the Goths, A. D. circ. 537, had adopted a detestable custom of putting their king to death if he did not please them, and choosing another. At length it was declared at a council, that if any one, "quem nec *electio omnium* probat, nec Gothicæ gentis nobilitas ad hunc honoris apicem trahit," should attempt to gain possession of the throne, he should be excommunicated. Concil. Tolet. v. c. 8. et v. Leg. Vis. ii. 1. § 6. and v. 7. § 19.

[2] Agathias, Hist. Franc. in tom. ii. of the French Hi-

no preference was given to priority of birth, or even, as it would appear, to legitimacy. The division was made by lot, and each took the *sors* or allotment which fell to his share[1]; even individual towns were sometimes divided[2]. The monarchy of the *Burgundians* was also hereditary in the male line[3]. The *Anglo-Saxon* monarchies also appear to have been elective[4]; but the candidates were confined to the reigning family. When the *Lombards* first settled in Italy, the people at large exercised the right of electing a monarch at their own free-will.

Prerogatives.

At the first establishment of the barbarian monarchies, the person of the barbarian kings was held in high veneration[5]. Whatever might have been the limits to the authority of the kings on their first settlement, the barbarian sovereigns soon endeavoured to assume to themselves the exercise of most, if not all, the prerogatives which

storians, p. 48, 51, and 71; and see the Pref. to the same volume, p. 55, and M. de Foncemagne's two excellent dissertations, Mem. de l'Acad. des Inscrip. tom. vi. and viii.

[1] Greg. Turon. iv. 22 and 50. Thierri, the son of Clovis, was a bastard, yet he took an equal share. V. Greg. Turon. c. ii. 38, iii. c. 1. So by the old Brehon law, bastards inherited with legitimate children. Coke on Lyttleton, 176, *a*.

[2] Greg. Turon, vi. c. 11. vii. c. 6.

[3] Ibid. c. 5, et seq.

[4] Turner, Anglo-Saxons, iv. p. 248, and his references.

[5] See Vis. ii. 1. § 7. Long. i. 13. 1 and 2, and all the codes on the subject of treason and infidelity to the king. Greg. Turon. v. c. 26, et spars.

had been exercised by the Roman emperors. Many of these prerogatives were yielded to them by general consent. The laws were declared to have their authority from the will of the sovereign [1]; the nobles and elders or wise men being called in only to advise as to their enactment. The kings also were declared to be the fountain of all dignities and honours; they had the absolute command of the army; and to dispute or disobey the royal *precepts* [2] in civil matters subjected the offender to severe penalties [3]. In cases of treason,

[1] All the laws and enactments in the continental monarchies, at least after the time of Clovis, purport to be made in the name of *the king* alone. See the prefaces to the codes in Lindenbroc. Charles the Bald, as Mr. Hallam has observed, succinctly expresses the theory of legislative power in his days in the following words: "Lex *consensu* populi fit, *constitutione* regis," V. Hist. Fr. tom. vii. p. 656; which definition might equally be applied to the Anglo-Saxon laws; see Turner's History of the Anglo-Saxons, iv. 265:—and indeed to the modern enactments of the British parliament; see Appendix, No. I.

[2] Jussiones, Præceptiones.

[3] Vis. ii. 1. 33. Bavar. tit. ii. § 9. Rip. tit. 65. It is not easy to ascertain the legal extent of these precepts. Gregory of Tours frequently mentions precepts granted by the kings for staying proceedings in the courts, and for other purposes, which cannot be reconciled with the existence of any definite limits to the prerogative of the crown. See particularly lib. iv. c. 47, also see the formularies of these precepts, in Lindenbroc, 48. 105. 112. 113. See also in Matthew Paris, p. 86. 132. 136, &c. instances of precepts of a similar nature issued by the early Norman sovereigns. These precepts at length became an intolerable grievance in France, as

or suspicion of treason, the most cruel severities on the part of the prince were permitted or overlooked [1]. The spirit of liberty which reigned in the breast of every Franc, in the early period of their history, prevented the sovereign, though armed with such ample prerogatives, from exercising a system of tyrannical authority [2]. Under the second race, the royal prerogatives were greatly extended. In the time of Charlemagne, indeed, there appear to have been scarcely any limits to the royal authority but such as were imposed by his own moderation. The sovereign had ample revenues for his support; he had a powerful and devoted band of adherents dependent on his will: and the continuance of the general assemblies of the nation, which might form some check upon the exercise of his prerogatives, was dependent on his pleasure. The codes of the Goths and Burgundians exhibit the kings themselves as anxious to prevent any exercise of the regal authority excepting where authorized by established custom or law [3]; the

I shall have occasion to notice in a future page; and amongst the *capitula super quibus facta est* MAGNA CHARTA, is the following: "Ne *breve* quod vocatur *precipe* de cætero fiat alicui de aliquo tenemento unde liber homo amittat curiam suam." Wilkins, p. 357.

[1] Greg Turon, vii. 36. &c. The law of the Lombards declares that it is *impossible* that a man can be innocent whom the king pronounces to be guilty.

[2] See Greg. Turon. i. c. 39. ii. c. 12. iii. c. 11.

[3] Prol. Leg. Burgundionum. Leg. Vis. ii. 1. 28.

Gothic king particularly, though he might not be publicly traduced, was open to the private and respectful remonstrances of every freeman, and judgment at law might be obtained and enforced against him at the instance of a subject [1].

Oath of fidelity or allegiance.

The barbarian sovereigns had a right to demand an oath of fidelity or allegiance from every freeman in their dominions. The Gothic kings, who had a large proportion of Romans amongst their free subjects, and whose countrymen were particularly turbulent, rigorously enforced this right [2]. The kings of the Franks also uniformly required this oath to be taken by the inhabitants of countries added to their kingdoms by conquest or succession [3]; and when, as was sometimes the case during the first race, the king sent a son to rule any portion of the empire with sovereign authority, antrustions usually accompanied him, to require, in the father's name, an oath of fidelity to the son [4]. In the early history of the barbarians, whenever the whole body of the nation was called out in arms, the king was always at their head, and he received the largest share

[1] Leg. Vis. ii. 1. § 8. In early times, the Gothic kings had greater authority than other German princes. Tac. de Mor. German. c. 43.

[2] Leg. Vis. v. 7. 19. et v. Leg. Rip. 69. § 1. Capit. Ann. 829. art. 4. cap. 4., from which it appears that the custom was of great antiquity.

[3] Greg. Turon. lib. iv. c. 40. Ibid. vii. c. 12.

[4] Hist. Fr. tom. iv. p. 433. Lindenb. Form. § 39. et Bignon. not. Mem. de l'Acad. des Inscrip. tom. vi. p. 704.

of booty[1]: but when an army was required merely to chastise an insolent neighbour, or to repel an invasion from an inconsiderable enemy, a duke or count was usually directed by the king to put himself at the head of the freemen of a province or county. The king alone had the power of calling together the general assembly of the nation; at which every individual who received the king's summons was bound to appear.

Revenue of the king.

Domains.

In every nation the sovereign enjoyed very ample domains, which were scattered in detached parcels, and at convenient distances, over various parts of the country. Each portion or farm was stocked with animals, and planted with fruit-trees and vegetables, and had a complement of hunters, farmers, vintners, brewers, bakers, and cooks[2], and others of a similar description, with their underlings, apprentices, and assistants, sufficient to cultivate the land and collect the profits, and to minister to the wants and amusements of the sovereign and his retinue whenever he might think proper there to take up his abode[3]. The surplus produce, more especially under the prudent regulations of Charlemagne, was sold and accounted for to the sovereign[4]. It may here be observed, that

[1] Greg. Turon. iv. 14. ii. 27.

[2] In Dig. xxxiii. 7. 12. § 3. 10. 12. 31. 32, et seq. may be seen the usual complement of a *Roman* farm.

[3] Greg. Turon. vi. 45. Gibbon, chap. xxxviii. note 88. Turner's Anglo-Sax. iv. p. 269.

[4] See Capit. de Villis, Histor. Fr. tom. v. p. 652, 657.

over each of the royal estates an antrustion presided, and, in imitation of the prerogative assumed by the Roman emperors, the kings deputed to such antrustions the power of administering justice to the tenants and occupiers of their domains [1]. The king also had forests and chases, which were exclusively reserved for his entertainment; and there is an instance of one Chundo, a great officer of state, having been stoned to death for sporting in a royal forest [2]. The fiscal domains were, as to succession, governed by the laws which regulated the possession of the regal authority. In elective monarchies, such parts as had not been legally disposed of became, on the death of the reigning king, the property of his successor; the king's individual property descended to his heirs [3]. Peculiar jurisdictions.

On the original conquest of Gaul by the Franks, the lands which were left to the original inhabitants, or the persons of the cultivators, were subjected to the payment of an annual tribute. There was also a tribute imposed upon the inhabitants of the towns. These tributes were collected, under the superintendence of the counts of the different provinces, and paid over to the royal treasury [4]. Amongst the Franks, the Tributes.

[1] See Form. ed. Lindenbr. § 90. Leg. Long. 1. 34. 1. Burg. tit. 50. §. 1. et v. Cod. Just. iii. 27. 11. ante p. 40, which same jurisdiction was afterwards exercised by the royal vassals to whom such lands were granted as benefices. See Esprit des Lois, xxx. c. 20. and the references.

[2] Greg. Turon. x. c. 10.

[3] Vis. ii. 1. 6.

[4] See Marculph. Form. i, 52. i. 8. Bignon remarks upon

lands subject to tribute still continued liable, even when in the possession of a Frank[1]; but it would seem that amongst the Visigoths the tribute was payable no longer than whilst the lands belonged to a Roman[2]. The Francic sovereigns also received tributes from the various nations whose kings had been compelled to swear fidelity to them; and from the dukes or præfects, who, by their appointment or sufferance, exercised supreme authority in the various provinces of the empire[3]. Amongst the Anglo-Saxons, the kings received, as part of their private revenues, large sums from the free burghers and inhabitants of towns, who were under their patronage[4]. Occasional contributions were also raised for public purposes from the freemen at large[5], but the king does not appear to have had any legal authority to raise taxes as a source of private revenue.

this formula, "Comites tributa etiam curasse et ærario intulisse vel hic locus evincit." See also Ruinart's Preface to Greg. of Tours, c. 11. in to. iv, of the French Historians, p. 79; also Greg. Turon. vii. 15 and 23. Lindenb. p. 678 and 876. Capit. Car. Magn. iii. c. 86.

[1] Greg. Turon. vii. c. 15. Marculf. Form. i. 19. and see Capit. Car. Mag. as to *tributaria terra*, in Leg. Long. iii. 8. 2, as edited by Lindenbroc.

[2] See the laws of the Visigoths, x. 1. § 16.

[3] Greg. Turon. i. 32. v. 27. vi. 42, &c.

[4] Int. alia, see the quotations from Domesday, in Brady on Boroughs, particularly as to Thetford, p. 5.

[5] As *ship money*, Bromton, 887. Leg. Canut. § 36. Bromton, 923, 933. et v. Asservit. vit. Alf. p. 8. These contributions will be noticed in the chapter as to freemen in general.

The kings of the Franks, of the first race, exercised to some extent the prerogative of levying taxes by way of indiction, both from the owners of land and from persons engaged in trade; but this appears to have been always treated as an usurpation; and an attempt made by Childebert to raise, by way of tax, a jar (amphoram) of wine from every acre of land, excited a serious riot [1], in the same manner as Hardicnute's imposition of ship-money, without the sanction of a general assembly, as we learn from the ancient chronicles, occasioned violent commotions at Worcester. Taxes.

[1] Montesquieu, lib. xxx. c. 1 and 15, asserts that the tax mentioned in the text concerned the Roman subjects only; but nothing in my mind can be plainer than that this was an attempt to levy a general tax or *indiction* (v. *ante*, p. 81). The passage is as follows: "Chilpericus verò rex *descriptiones novas* et graves *in omni regno suo* fieri jussit. Qua de causa multi relinquentes *civitates* illas vel *possessiones proprias* alia regna petierunt. Satius ducentes alibi peregrinari, quam tali periculo subjaceri. Statutum enim fuerat ut *possessor* de propria *terra* unam amphoram vini per aripennem redderet, (which is the tax in question) sed et *aliæ functiones* infligebantur multæ, tam de reliquis *terris* quam de *mancipiis*; quod impleri non poterat. Lemovicinus quoque populus cum se cerneret tali fasce gravari, congregatis in calendis Martiis, Marcum Refendarium, qui hæc agere jussus fuerat, interficere voluit, et fecisset utique nisi eum episcopus Ferreolus ab imminenti discrimine liberasset. Arreptis quoque *libris descriptionum*, incendio multitudo conjuncta concremavit: unde multum molestus Rex dirigens de latere suo personas, immensis damnis populum adflixit, suppliciisque conterruit, morte multavit. Ferunt etiam tunc *abbates* atque *presbyteros* ad stipites extensos diversis subjacuisse tormentis, *calumniantibus* regalibus missis quod in

Tolls and dues.

Tolls and dues were collected on the highways, on bridges, and at rivers ports and harbours, and paid to the king or his grantees [1].

The king received fines or *freda* to a considerable amount from the various courts of justice in the nation; and every proprietor of land, who, when an army was called out, refused or delayed to join his peers, (pares) was subject to a fine to the king, denominated the *bannus* [2].

seditione populi ad incendendos libros satellites adfuissent, acerbiora deinceps infligentes tributa." Greg. Turon. lib. v. c. 29. Montesquieu, indeed, could not bring himself to think that any taxes were ever imposed upon freemen. See Esprit des Lois, ubi sup.; but the *tributa* which Parthenius caused to be levied for Theodebert, must have been general public *taxes;* (Esprit des Lois, liv. xxx. c. 12. and Greg. Turon. l. iii. c. 36.) and in § 8. of the edict of Clothaire, namely, "Ut ubicunque *census novus* impie additus est, et a populo reclamatur, justa inquisitione misericorditer emendetur;" *census* must refer to some species of public tax, probably a tax upon industry. See also Greg. of Turon. lib. ix. c. 30. and Marculf. form. lib. i. f. 4. and ibid. lib. i. f. 2. where the expressions; "Et quicquid exinde fiscus noster *forsitan* de eorum *hominibus*, aut *de ingenuis*, aut de *servientibus in eorum agris commanentibus*, vel undecumque poterat sperare," &c., as it appears to me, cannot but refer to the tributes and taxes of the description mentioned in the text.

[1] Diploma Segeberti Regis, Hist. Fr. tom. iv. p. 635, et p. 643. Form. ed. Lindenb. ii. § Cap. Car. Mag. ed. Lind. iii. § 12 and 54. Leg. Long. iii. 1. 5. and 31. Turner's Anglo-Saxons, iv. p. 269. Of the similar duties levied by the Roman emperors, see Dig. xliii. 12. 3. § 1. and l. 4.

[2] Vide *post*, of the Bannus and Fredum; et prol. leg. Burg. Edict. Theod. c. 24.

The fiscal property was continually augmented by seizures of the treasures of traitors and the spoils of the chiefs who were invested with the honours of duke, count, and præfect [1]. It was usual also for those who enjoyed any office of dignity or emolument, to secure their continuance in it by large presents made to the king at the general assemblies of the nation [2]. Confiscations.

The king of the Francs was surrounded in his capital, and in his visits to his domains, by his *antrustions* [3],—a band of heroes, whose lives and fortunes were voluntarily devoted to his personal King's companions. Antrustions. Leudes.

[1] Leg. Long. i. tit. 1. Greg. Turon. v. 26, et spars.

[2] Greg. Turon. lib. iv. c. 42. viii. 18. x. 26. Chronicle of Heldesheim, A.D. 750, cited by the Abbe Vertot in his Parallel of the Manners of the Germans and Franks, Mem. de l'Acad. des Inscr. tom. ii. Hist. Fr. tom. ii. p. 647. "Mos est civitatibus," says Tacitus, "ultro ac viritim conferre principibus vel armentorum vel frugum, quod pro honore acceptum etiam necessitatibus subvenit." De Mor. Germ. c. 15.

[3] *Leudes, antrustiones, fideles.* Sal. tit. 43. § 4. Decret. Childeberti, &c. The Comites of Tacitus, de Mor. Germ. c. 13. and 14. "Illum (principem) defendere, tueri, sua quoque fortia facta gloriæ ejus assignare, præcipuum sacramentum est." The following was the form of appointment as recorded by Marculphus:—"Rectum est ut qui nobis fidem pollicentur illæsam nostro tueantur auxilio: et quia ille noster fidelis, Deo propitio, veniens ibi in palatium nostrum una cum *aremania* sua in manu nostra *trustem* et fidelitatem nobis visus est conjurasse, propterea per præsens præceptum decernimus ac jubemus ut deinceps memoratus ille in numero antrustionum computetur, et si quis fortasse eum interficere præsumpserit, noverit se wirigildo suo sol. DC. esse culpabilem." Lin. denb. p. 1238.

service [1]. The numbers and devotedness of the antrustions or leudes, formed the principal glory of the barbarian king, as in former times the numbers of their companions had been the pride of the leaders of the German hordes. The king was principally esteemed in foreign courts by the numbers and devotion of his antrustions; "Long live the king who has such antrustions!" was the exclamation of the antrustions of Gondebald, when those of Clovis had succeeded in the object of their embassy.

The king alone could appoint his antrustions, but any freeman [2] might offer himself as a candidate for this honour. If approved by the king, he, with his hands between those of the king, promised with an oath to be his trusty man, and to be faithful to him in all things for life: then the king gave him a charter of antrustionship [3]. This honoured body, together with the dukes, counts, and præfects, were the nobility or *proceres* of the kingdom [4]. The companions of the German

[1] The fidelity of the leudes of Theodebert, son of Thierri the first, preserved to him his kingdom against the united attacks of his uncles Childebert and Clotaire. Greg. Turon. iii. 23.; ib. v. 29. Histor. Fr. to. iv. p. 483.

[2] Montesquieu has called this in question; but, as it appears to me, without sufficient authority.

[3] See Formul. ed. Lind. 40 and 47. Marculf. Form. i. f. 18. Cap. Car. Magn. inserted in the law of the Lombards, iii. 2. 4. et v. Bignon. not. in supradict. form.

[4] *Proceres*, Greg. Turon. ix. c. 20. *Optimates*, Add.

prince were distinguished by him according to their merit in his eyes by various marks of his favour[1]. Acquaintance with the institutions of the Romans, and a progress in civilization, furnished the Barbarian kings with offices and names to distinguish the ranks of their antrustions, and led to the institution of the various offices of the palace[2].

Officers of the palace.

Originally the officers of the palace were divided into two classes, mayors of the palace and domestics. From amongst these a refendary or chancellor[3], treasurer, and president of the council[4] were appointed. One of the domestics presided over each of the royal estates[5]. The tutor of the king is mentioned as a person high in dignity in the palace[6]. Under Clothaire II., about A. D.

Leg. Burg. i. cap. 18. § 2, &c.; and see the authorities cited by the Abbé Mably, to. i. p. 424. These words are often used in the Francic and Anglo-Saxon annals to denote the members of the general assemblies of whatever rank.

[1] "Gradus quinetiam et ipse comitatus habet, judicio ejus, quem sectantur." Tac. de Mor. Germ. c. 13.

[2] "Optimates, *majores domus, domestici.*" Leg. Rip. tit. 88. "Optimates, *conciliarii, domestici, majores domus,*" &c. Pref. ad Leg. Burg. et v. Form. ed. Lind. 109, where the various denominations are more fully detailed; and Leg. Vis. v. 7. 19.

[3] *Refendarius.* "Annulum principis refendarium tenuisse Greg. Turon. ostendit," (lib. v. c. 3 and 4.) "Subscriptionem etiam regiis literis opposuisse idem testatur." (x. 19.) Bignon. not. in Greg. Turon.

[4] Comes palatii, Marc. Form. i. § 38. Lind. 157.

[5] Vide Form. edit. Lindenbr. 90. "Ego in Dei nomine *domesticus* gloriosi domini regis, super *villas* ipsius," &c.

[6] Histor. Fr. tom. ii. p. 601.

Mayor of the palace.

589[1], we find one officer of the palace distinguished as the major-domus, and possessing next to the king the highest rank and authority in the nation, having the authority of a viceroy rather than of a mere officer[2]. This dignitary was originally appointed by the king; but, in 641, the nobles had acquired the right of electing him[3]. The extent to which the power of the major-domus arrived in the person of Charles Martel, the founder of the Carlovingian race, it is scarcely necessary to mention[4]; but we may observe with Mr. Gibbon, that, "like the prætorian præfects, the counts of the domestics, and mayors of the palace, aspired from the service of the palace to the command of the armies."

The antrustions were held in the highest esteem even when not in possession of any ostensible dignity[5]. It is probable that, unless some very urgent

[1] Badegisilus, who appears to have been the first, was appointed about A. D. 511.

[2] V. Vit. Sanct. Segeberti, cap. 4. Hist. Franc. tom. ii. p. 600. The first who obtained the office *for life* was Warnacharius. He was appointed mayor or regent of Burgundy A. D. 613. Espr. des Lois, xxxi, c. 1.

[3] See Gesta Reg. Franc. c. 43. Hist. Fr. tom. ii. pp. 368, 369. Esp. des Lois, liv. xxxi. c. 3.

[4] Gibbon, vol. iii. p. 77. Esprit des Loix, xxxi. c. 5, 6. 7. The Demiking, or totius Angliæ Aldermannus, mentioned by Rapin, vol. i. p. 149, and Selden, Titles of Honour, part ii. c. 4, was a dignitary very like the mayor of the palace. The office was not long continued.

[5] Their value, or weregild was generally three times the amount of that of a freeman. Form. ed. Lind. 47. Leg. Rip. ii. § 1. Leg. Sal. 44. § 1, &c.

reasons intervened, the præfects, dukes, and counts appointed or recommended by the king were chosen from this dignified body [1], and that all other offices of trust and emolument, relating to the person of the king, and the government of the kingdom, were filled by antrustions [2]. The antrustions constituted the privy-council or general advisers of the sovereign [3].

Anglo-Saxon king's thanes and gesiths.

There was amongst the Anglo-Saxons a class of nobles, who were called king's thanes, and who were not amenable to any jurisdiction but that of the king. Some of these nobles were always in attendance on the king's person; and it was from them that the eorls were generally selected [4]. There was also an order of nobles called by Bede *Comites*, by Alfred in his translation *Gesiths*. These distinguished persons have been considered as the antrustions of the Anglo-Saxon sovereigns. However, neither the king's thane nor the gesith was held in nearly the same consideration as the Francic antrustion; both were ranked below the eorl [5]; and this circumstance perhaps tended greatly to prevent among the Anglo-

[1] See Greg. Turon. vi. c. 11. "Pandulphus ex *domestico ducem* factus," &c. ib. viii. c. 18. Aimoin. i. c. 14.

[2] Form. ed. Lind. 114, 39. Leg. Vis. iv. 5, 5. Capit. Ann. 829, § 4.

[3] Addit. ii. Leg. Burg. c. 13. Capit. ed. Lindenb. v. § 224. Greg. Turon. x. c. 5, &c.

[4] V. Chron. Sax. p. 57. 95-6-7. Leg. Cnut. § 97. Heywood, p. 160-2. 192. &c.

[5] Lingard's Hist. of England, vol. i. p. 474, 475, and the references there.

Saxons that inordinate increase of power, first on the part of the kings, and afterwards of the nobles, which destroyed in France, under the second race, the whole fabric of political government.

Origin of fiefs.

The barbarian kings, when settled in their new dominions, obtained the means of conferring on their antrustions a more solid recompense than they had been able to bestow in their native wilds[1]. Immediately after their settlement, it became a custom with the barbarian kings to grant to their antrustions portions of land, parcel of the royal domain[2], together with the privileges after mentioned, which were denominated *benefices* or *honours*. There is no positive evidence that these benefices were conferred on antrustions alone[3]; but as the antrustions were the men who

Benefices or honours.

[1] "Nam epulæ et quanquam incomti largi tamen apparatus pro stipendio cedunt, materia munificentiæ per bella et raptus." Tac. de Mor. Germ.

[2] Paul Winifred, Hist. Long. lib. iii. c. 16, relates that "Hujus in diebus (viz. Authari regis) ob restaurationem Regni Duces qui tunc erant *omnem substantiarum medietatem* regalibus usibus tribuerunt, ut esse possit unde Rex ipse, sive *qui ei adhærent* ejusque obsequio per diversa obsequia dediti, *alerentur*."

[3] The 13th section of the 2d Addit. to the law of the Burgundians would seem to indicate that in that kingdom honours might be granted to all ranks of freemen. According to Montesquieu, it was not until after the reign of Gontran, (Esprit des Lois, xxxi. c. 24,) that amongst the Francs any but antrustions were capable of taking a benefice; but no freeman was excluded from being made an antrustion.

usually officiated about the person of the prince, and therefore had the largest claims upon his favour, and the most powerful influence over him, they would at least be the principal beneficiaries.

v. The king, usually, in the grant of a benefice, not only conferred on the beneficiary the emoluments of the soil, but also granted to him civil jurisdiction over the inhabitants of the district[1] so granted, and prohibited all judges and envoys from entering on the granted lands, to exercise any authority. The fines, freda, and other dues which had theretofore been levied from the inhabitants, and paid to the royal treasury, were granted to the beneficiary, together with the benefice[2]. In some instances the kings appear to have granted to the proprietors of estates by way of benefice

Territorial jurisdictions.

[1] *V. Ante*, p. 267. The inhabitants over whom such jurisdiction was given must have been the artificers, who were chiefly freedmen, and the *tributarii* or *coloni*, or free cultivators of the soil attached to the land living in the *vills* or small towns, and the slaves. See Marculph. Form. i. f. 2. Ibid. f. 45. "Quapropter præsenti autoritate nostra decernimus, quod perpetualiter mansurum esse jubemus, ut ipsam villam illam ante dictus vir ille, ut diximus, cum omni integritate, cum terris, domibus, ædificiis, *accolabus*, *mancipiis*, viniis, sylvis, campis, pratis, pascuis, aquis, &c. &c. vel *quælibet genera hominum*, ditioni fisci nostri subditorum qui ibidem commanent, in integra immunitate, absque introitu judicis, de qualibet causa, freda ad exigendum, perpetualiter habeat concessam," &c.; of the similar grants made by the Anglo-Saxon kings, V. infra, *Courts of Justice*.

[2] Form. edit. Lindenb. 44. 45. 46. Decret. Child. § 12. Decret. Clot. § 3. Lindenb. p. 347. 349.

the right of levying the fines and dues payable to the treasury from their possessions [1], and a co-extensive right of administering justice. Such grants would usually be made to proprietors who commended themselves and their lands to the patronage of the king [2]. In the time of Charles the Bald, and even of Charlemagne, the judicial authority of the Francic beneficiaries, or vassals as they were called from the time of Charles Martel, had become general if not universal throughout the new empire of the west [3]; the same was the case in Britain in the time of Edward the Confessor; but Theodoric the Great would not allow any such privileges to the grantees of the fiscal domains; and throughout the whole territory of the Swabians and Bavarians, when their codes were compiled, every one was amenable, both civilly and criminally, to the jurisdiction of the count alone [4].

Benefices, though frequently [5] granted as a re-

[1] Form. edit. Lindenb. 7. Similar grants were made to ecclesiastics. V. Marculph. Form. i. f. 3. ed. Lind. 6. p. 1217. 1218. Hist. Fr. tom. iv. p. 642. 649. 690. 697. &c. et v. inf. *Courts of Justice.*

[2] The mode of commendation may be seen in f. 47. of the Formulæ of Lindenbroc.

[3] Vide Capit. Car. Mag. inserted in Leg. Longob. ii. 52. 2. Form. Baluz. 3. Hist. Fr. tom. iv. p. 578; and see Baluze, tom. i. p. 198; and Esprit des Lois, xxx. c. 22.

[4] Edict. Theod. c. 25. Leg. Alam. tit. 36, § 5. Bavar. tit. 2. c. 15, § 1.

[5] Form. edit. Lindenb. 44. et v. ibid. 45 and 46. See also Leg. Vis. v. 2. 2. de donationibus Regis.

ward for past services, were most commonly conferred in order to secure some future service[1], as the attendance of the beneficiary on the king's person, or the serving some office in the palace. However, stated services were not the only considerations for which benefices were conferred. The personal attachment of a powerful man, which was secured by the acceptance of a benefice, was alone a sufficient consideration for such a grant, in an age when the chief men of the nation had the power to control the royal authority, and to divert the succession of the crown from its accustomed channel[2]. No stipulations were requisite to secure this attachment, even though the beneficiary were not admitted to the honour of being an antrustion, which, however, would seldom be omitted[3]. When a benefice was conferred as a reward for past services, it might possibly be granted for the life of the beneficiary; but there is great reason to believe that, generally speaking, the benefices conferred by the barbarian kings were at first, as a pecuniary

Obligations of the beneficiary.

[1] Form. ed. Lindenb. 44.

[2] V. Greg. Turon. iii. c. 23. iii. c. 11. iv. c. 14.

[3] *Vide* inf. *Of Lord and Vassal.* It would appear that, in the time of Charlemagne, the royal beneficiary always did *homage* on receiving his benefice, by which he was in effect constituted an antrustion. See Form. ed. Lind. 40 and 47. Capit. ed. Lind. lib. iii. § 20. Ib. § 71; and Hervé, Theorie des Mat. Feod. et Cens. tom. i. p. 352, 357.

stipend would have been, revocable at pleasure[1]. A custom was early introduced amongst the Burgundians, that the children should retain the royal benefices, if able and willing to perform the services (*obsequia*) in contemplation of which they had been granted to their parents[2]. The Franks, irritated at the arbitrary manner in which benefices were resumed by their princes, strove for the same privilege[3]. At length it was conceded by Gontran and Childebert, at the treaty of Andelaus, A. D. 588, that benefices should be irrevocable, at least for the life of the grantee[4]. On this occasion no express mention appears to have been made as to any service or acknowledgment to be rendered, or as to the rights which the king was to enjoy as superior lord. Every beneficiary was bound, according to the established law, to yield towards his lord or patron *gratitude* and *reverence;* but the particular duties which were included under this obligation were perhaps scarcely yet sufficiently settled to be capable of definition[5]. The *military service* which

[1] Lib. Feod. tit. i. § 1; and see Robertson's Charles V. vol. i. note viii.

[2] Burg. tit. i. c. 3 and 4.

[3] Gibbon, c. xxxviii.

[4] Pact. apud Andelaum, Greg. Turon. ix. c. 20. Histor. Fr. tom. ii. p. 343, 344. Theorie des Mat. Feod. et Cens. par M. Hervé, tom. i. p. 71, et seq.

[5] Of *Ingratitude* (the *culpa* referred to in the Pact. apud Andelaum, ubi supra), see Greg. Turon. ix. c. 38. Vis. ii. 1. 34. et v. infrà, *Of Lord*

the sovereign was entitled to claim from his beneficiaries, and on which so much stress has been laid[1], was no other than all the freemen in the nation were liable to; for originally every free man, whether a beneficiary or not, was bound, at the command of the king, to join the army, properly accoutred[2]. However, if the beneficiary or vassal whose duty it was as an antrustion to attend on the person of his sovereign, did not join the army on the day appointed, he was liable, in the time of Charlemagne, to the trifling penalty of being obliged to abstain from flesh and wine for as many days as he made default[3]; and for those delinquencies and offences

and Vassal. The authors of the Book of Feuds, book ii. tit. 43 and 44, class under *ingratitude* the omitting, for a year and a day after the death of the lord, to come to the heir to take the oath of fidelity, and the deserting the lord in battle.

[1] See Hervé, § 65, as to this supposed *peculiar* obligation of military service.

[2] Capit. ed. Lind. lib. iii. § 67, 69, 70, p. 884. In § 74, it is declared, that all are liable to the obligation of bringing arms, provisions, &c. according to *ancient custom.* Et v. Wilkins, p. 122. 145. 205. &c. In Leg. Vis. ix. 1. 8 and 9, the *reasons of policy* for this general obligation are stated, but it was modified in respect of small proprietors. V. *post*, p. 320.

[3] Capit. Car. Mag. ad Aq. Palat. Ann. 807, § 1, 2. Baluze, tom. i. p. 255. Charles Martel was merely a successful usurper; it became necessary, therefore, that he should take every precaution to secure to *himself* the attachment of the nobles; and the Abbé Mably, Observations sur l'Histoire de France, tom. i. p. 364, &c. offers some strong reasons founded

against discipline for which a free soldier, as a member of the community, was punished by fine, the royal vassal incurred a forfeiture of his benefice on the ground of ingratitude to his lord[1]. When the system of dependent or arriere fiefs became established, which system appears to have had its origin about the time of king Pepin, the royal beneficiary or vassal was bound to lead his dependent vassals to battle[2]. In the time of Charlemagne, the counts exercised a general superintendence over the royal domestics and vassals, and might seize the benefices of the vassals who refused to do justice. Benefices first became generally hereditary in France in the reign of Charles the Bald, about A. D. 877[3].

Subinfeudation.

King's court.

Amongst the Francs, a court was held before the king, and the dukes, bishops, counts, and antrustions who attended the royal person[4]. This court, which was always open, was denominated *curia regis*, or *forum regis;* but amongst the Francs, the king did not, at least latterly[5], preside there in

on this circumstance for the supposition that the benefices of Charles Martel were granted on the *express condition* that the beneficiary should render military service to *him*.

[1] V. Capit. ed. Lindenb. iii. § 71. et Wilkins, ubi sup.

[2] Esprit des Lois, xxxi. c. 26. et v. Wilkins, Leg. Anglo-Sax. p. 145.

[3] See the capitularies cited by Montesquieu, liv. xxxi. c. 28.

[4] Marc. Form. i. f. 25. Lind. Form. 109, ib. 113.

[5] "Reges olim *proprio ore* jus dixisse notum est, episcopis et proceribus adsistentibus."

person. The count of the palace was first appointed to preside, but was afterwards supplanted by the mayor of the palace [1]. A similar court was held by the Anglo-Saxon sovereigns [2]. This was the supreme court, and general court of appeal for the nation [3]. At this court also all questions not provided for by the laws were decided [4]; and a man

Note of the editor on Capit. lib. iii. c. 77.

[1] Marculf. Form. i. f. 37. Lind. 157. Greg. Turon. v. c. 19. Histor. Fr. note (*h*), p. 246. Hincmar. Epist. 14. cited by Heinneccius, Elem. Jur. German. iii. tit. 1. § 17.

[2] Leg. Eadg. Polit. § 2. Leg. Cnut. § 16.

[3] The Anglo-Saxon and Norman monarchs held their court *de more* as a matter of state, and for judicial purposes, three times a year. V. Int. al. Huntingdon, 390, 5. On these occasions the court was composed of the earls. V. Bromton, p. 990-96. and other dignitaries, the king's thanes attendant on the king's person, and the dignified ecclesiastics of the kingdom. V. Sup. et Huntingdon, 378, 9. The kings were also in the habit of holding extraordinary councils, or assemblies, at which, amongst other business, important lawsuits were decided. V. Hist. Eliens. c. xlvi. Wilkins, p. 77. 80. 136; Flor. Wigorn, p. 501; and see Turner, iv. p. 326-7. At these assemblies the same descriptions of persons attended as at the courts *de more;* both were denominated indiscriminately *curiæ regis* and *concilia* (*post,* tit. Wittenagemot); and perhaps in latter times they differed in nothing excepting in numbers. V. Edin. Rev. 69. p. 7. Lawsuits were certainly often decided at the Saxon Wittenagemots, or general assemblies; and *Rhetores* and *causidici* attended them. See Hist. Eliens. Gale, 469. The select Council (V. Rot. Pat. 42 H. III. m. 1. Cot. Abr. p. 57. ad Ann. 21 Edw. 3.) of the Norman sovereigns, was introduced after the conquest.

[4] Marculf. Form. i. f. 28. Lind. 113. Ibid. l. i. f. 37. Lind. 157. Bignon. not. in Hist. Fr. tom. iv. p. 482.

who had commenced a suit in the county court against a person in authority, and was dissatisfied with its progress, might remove it by relation to the king's court[1]. Here the nobles were arraigned for high crimes and misdemeanours; and though the nobles had the option to proceed before the county tribunals, it was in this court that controversies in which they were concerned were usually decided[2]. The antrustion who, after a legal summons, refused to appear in the county court to answer a freeman not noble, might be sued by the complainant before this tribunal[3]. Sales and transactions of considerable importance between freemen of all classes were, for greater solemnity, concluded in this court[4]; and slaves were

Vis ii. 1. 12. Burg. tit. 53. Many of the laws in the codes of the Burgundians and Lombards are *reports* of causes determined in this court. Burg. tit. 51, 52, 53. Long. i. 175, &c.; et v. Leg. Canut. § 16.

[1] Greg. Turon. vii. c. 23.

[2] Ibid. viii. c. 30. That such also was the case amongst the Anglo-Saxons, see Gale, p. 440. 442. and 444. et *ante*, p. 283.

[3] Leg. Sal. edit. Eccard, tit. 76. Marc. Form. lib. 1. f. 29. Lind. 111, and Marc. Form. lib. 1. f. 21. Lind. 115. Greg. Turon. vi. 31, vii. 23, and Bignon. not. in Marc Form. lib. 1. f. 25. Histor. Franc. iv. p. 477. The proceedings in this court, as a court of last resort, particularly amongst the Anglo-Saxons, will be more fully noticed under title *Courts of Law*.

[4] Marculf. Form. i. f. 13, Lind. 43. Ibid. ii. f. 1. Lind. 5. Bignon. not. in hanc Form. Hist. Fr. tom. iv. Such was also the practice at the king's court amongst the Anglo-Saxons. See Turner's Anglo-Sax. and Lord Coke's preface

manumitted there. When deeds or evidences of title to land were lost or destroyed, general confirmations of title were, at the petition of the owner, issued from this court, in the name of the king[1]; and the king, on being petitioned to that effect by the parties, sometimes sent one of the members of this court to superintend partitions between the co-owners of undivided lands[2].

Advocates were assigned by the king to represent and protect the interests of those persons who, on the ground of ignorance or incapacity, declared themselves unable to conduct their causes, whether in the king's court or in the county tribunals. The advocates, defensores, or advocati, (*avoués*) of ecclesiastical bodies were also appointed by the king[3].

to his sixth Report, fol. iii. b. and v. b. Thorn. p. 1761. temp. Ethelberti, Reg. &c.

[1] Marc. Form. i. f. 22. Lind. 102. lib. i. f. 31 and 34. Lind. 42 and 114. So at an Anglo-Saxon assembly of Witan, held in 903, an ealdorman having stated that his title-deeds had been destroyed by fire, new ones were on his petition ordered to be made out for him, as nearly similar to the former as they could be made from memory. Turner's Anglo-Saxons, iv. p. 284.

[2] Marc. Form. i. f. 20. Lind. 114.

[3] Marc. Form. i. f. 21. Lind. 115. Bignon. not. in hanc formu. Hist. Fr. to. iv. p. 649. Ecclesiastical bodies amongst the Anglo-Saxons also had *advocati*, but by whom appointed does not appear. Hist. Eliens. ap. Gale, p. 416.

CHAPTER V.

BISHOPS AND CLERGY.

Bishops and clergy.

THE religion of the ancient Germans taught them to believe that the ministers of its sacred rites were the agents of that Omnipotence whom they worshipped under various forms and denominations [1]; they accordingly paid to their priests the highest veneration [2]. With minds thus inclined to superstitious fervour, they were converted to Christianity in an age abounding in religious wonders. The ministers, too, of the new religion were conspicuous from their superior cultivation of intellect: hence we need not be sur-

[1] "Eoque omnis superstitio respicit tamquam inde initia gentis, ibi regnator omnium Deus, cetera subjecta atque parentia." Tac. de Mor. Germ. c. 39.

[2] "Neque verberare quidem nisi sacerdotibus permissum; non quasi in pœnam nec ducis jussu, sed velut Deo imperante, quem adesse bellantibus credunt." Tac. de Mor. Germ. c. 7. And see Cæs. de Bell. Gall. lib. vi. c. 13, as to *excommunication* by the priest amongst the Gauls, which, as Mosheim has observed, Eccles. His. ii. p. 64, was adopted into the Christian discipline of the early ages.

prised that the chiefs of these ministers [1] should be classed by the barbarians in the first ranks of their nobility [2]. When a bishopric was vacant, it appears to have been the original practice throughout the Francic [3] empire for the freemen of the province to fix on some person to supply the vacancy. A petition was then presented to the king (a formula of which is preserved in the collection of Marculphus), praying his precept to the metropolitan, or a certain number of bishops, usually three, to consecrate the person recommended. This was complied with, unless the king or his council had some objection to the person proposed, or had already fixed on a successor, in which case the

Mode of election of bishops.

Precept for consecration.

[1] The authority of a bishop seems to have been of equal extent, in point of territory, with that of a duke. See the general preface to the law of the Alemans, edit. Lindenb. p. 363.

[2] Leg. Rip. tit. 36, § 9. Bavar. tit. 1. c. 11, &c.

[3] Fleury, Mœurs des Chrêtiens, p. 278, states that, in the *first ages* of Christianity, on a vacancy occurring, the bishop was chosen by the bishops of the province, assembled in the vacant church, in the *presence of the people*. The reason that the people were called in (as appears from St. Cyprian, Epist. 34. cited by Casaubon in Æl. Lamprid. Alexr. Severus) was "ut plebe presente vel detegantur malorum crimina vel bonorum merita prædicentur, et sit ordinatio justa et legitima quæ omnium suffragio et judicio fuerit examinata." The 123d novel of Justinian, c. 2. is to the same effect. The *Nolo episcopari* had its origin in a constitution of the emperor Leo, who ordained that "nemo gradum sacerdotii venalitate mercetur, itaque castus et humilis nostris temporibus eligatur episcopus; — indignus est sacerdotio nisi fuerit ordinatus *invitus*." Cod. Just. i. 3. 31.

Nolo episcopari.

election, or rather recommendation of the people was disregarded, and the precept directed the metropolitan or bishops to consecrate the person whom the king had chosen[1]. The precept, as it appears, was always obeyed. However, if a bishop incurred the displeasure of his flock, they often forced him from among them without any ceremony, and procured another to be consecrated in his room. Thus Breccius, fourth bishop of Tours, having been accused of adultery, the citizens expelled him from amongst them, and chose another in his room; and though countenanced and protected by the metropolitan, it was many years before he was readmitted. Gregory himself was kept in considerable subjection by his flock[2].

Next in rank to the bishop was the abbot, then the presbyter, who, if free, was equal in rank with an antrustion; next came the deacon, then the sub-deacon: all of whom were far superior in *value* to a free layman. Simple clerks ranked according to their birth, whether slaves, freedmen, or free[3].

[1] Marc. Form. i. f. 5 and 6, and the notes on the above formulæ in Histor. Fr. to. iv. p. 471. Leg. Bavar. tit. i. c. 11. § 1. Greg. Turon. iv. c. 7. 15 and 17. viii. c. 20 and 22. x. c. 26. Form ed. Lindenb. 1, 2, 3, 4. Nearly the same system prevailed amongst the Anglo-Saxons; v. int. alia, Higden Polychron. ad A. D. 684. Bede, lib. iv. c 28. Higden, ad A.D. 964. Wallingford, ap. Gale, p. 544. Chron. Sax. 52, 53. &c. and even down to the reign of William Rufus. V. Matt. Paris, p. 16. I do not enter into the subject of receiving the *Pall* from Rome.

[2] Greg. Turon. lib. x. and lib. viii. c. 40.

[3] Leg. Rip. tit. 36. § 5, 6, 7, 8, and 9.

It appears that the king had the power of granting immunities to ecclesiastical bodies, which exempted them from all dependence on the bishop of the diocese [1].

No one in orders could be called on to pay or discharge any public tribute or function: hence, that neither the revenues of the king nor the force of the kingdom might be diminished by fraudulent or too frequent ordinations, it was necessary to obtain the royal licence, before any one was suffered to undergo the clerical tonsance [2]. Priests and deacons were forbidden to have any females under their roofs but their mothers, daughters, and own sisters [3]: Charlemagne forbade priests to visit any woman alone [4]; a pretty good index of the morals of the times.

Civil duties of bishops.

Amongst the Visigoths the bishops were particularly directed to watch over all judges in the administration of justice [5]. Clothaire gave them

[1] Marculf. Form. append. f. 44.

[2] Marc. Form. i. f. 19. and Bignon. not. in hanc form. Hist. Franc. to. iv. Form. ed. Lind. 31.

[3] Leg. Bavar. i. 13. § 1 and 2; and see Cod. Just. i. 3. 19.

[4] Capit. Carol. et Ludov. edit. Lindenb. lib. vii. c. 16.

[5] Vis. ii. 1. § 29, 30. Ibid. vi. 4. § 3. &c. By an imperial edict, inserted in the appendix to the Theodosian Code, edit. Sirmond, Paris, 1631, and supposed by Baronius to have been directed by Constantine to the Præt. Pref. Ablavius, A. D. 314, it is ordered, that "omnes causæ quæ vel prætorio jure vel civili tractantur, episcoporum sententiis terminatæ, perpetuo stabilitati jure firmantur, nec liceat ulterius

a similar authority among the Franks [1]. Bishops are frequently mentioned by Gregory of Tours as sitting with the judges in the temporal courts; and they were frequently applied to, when all other expedients were tried in vain, to restrain by persuasion, or, if that failed, by the terrors of excommunication, the rapine and iniquities of the robbers who,[2] "*peccatis populi ingruentibus*," were frequently dignified with the honours of counts and præfects. A bishop also usually presided in the county and hundred courts of the Anglo-Saxons, together with the earl or sheriff.

Jurisdiction.

Amongst the Visigoths wills might be published either before witnesses, or before a priest [3], the superintendence of wills being considered to be peculiarly consonant to the clerical character [4]. The clergy at length very generally throughout Europe assumed a jurisdiction over wills; they also assumed a jurisdiction in respect of marriages. This

tractare negotium quod episcoporum sententia deciderit." But two laws in the Code of Justinian, i. iv. l. 7 and 8. dated A. D. 398 and 408, declare that no clerk shall have jurisdiction in civil cases, excepting when chosen as *arbitrator*.

[1] Clot. Reg. Constitutio general. § 6. A. D. 560. Histor. Franc. to. iv. p. 116.—See Greg. Turon. lib. x. c. 8. &c.

[2] V. Greg. Turon. v. 49. x. c. 8. &c.

[3] Leg. Vis. ii. 5. 14.; and see Beaumanoir, p. 57. &c.

[4] Ecclesiastical jurisdiction as to wills in England may be traced to the same source. See Blackstone's Comment. p. 494.; and Selden's Jan. Angl. there quoted.

will be hereafter more particularly noticed [1]. In England, William the Conqueror first separated the ecclesiastical courts from the civil courts. During the time of the Anglo-Saxons, all controversies and questions, ecclesiastical as well as civil, were decided at the county or hundred court [2].

Privilege of sanctuary.

There was a privilege of sanctuary attached to every church, and a certain space around it [3], which was generally occupied by every species of criminal [4]. The laws forbade, under severe penalties, the taking any one from a sanctuary, without the consent of the bishop or other dignified ecclesiastic [5].

Possessions of the church.

It is probable that at first the possessions of the church were small; but, by the liberality of the kings and the people at large, they soon increased to an immense amount [6]. The lands given to eccle-

[1] Vide *post*, title *Wills* and title *Marriage*.

[2] Wilkins, p. 292. &c.

[3] M. de Pouilli has founded a very ingenious theory on the rise and progress of the temporal jurisdiction of the church on this right of sanctuary. Mem. de l'Acad. des Inscrip. to. xxxix. p. 366.

[4] Greg. Turon. vii. 21 and 22. See also the story of Leudastes, Greg. Turon. lib. v. and vi. Ibid. viii. c. 19. ix. c. 6.

[5] Leg. Alam. tit. 3. § 3. Bavar. tit. 1. c. 7. Decret. Clothair. § 13. The law of the Saxons, tit. 3. § 4. et seq. directed that a *faidosus*, taking refuge in a sanctuary, should be delivered up; but, as Heinneccius has observed, this was not the general law. And see Bracton, 136. a.

[6] Leg. Alam. tit. 1. § 2. Bavar. tit. 1. Form. ed. Lind. 6 and 7. The following is a common preface to a gift made to the church: "Prosperum et

siastical bodies or dignitaries descended to the successors of the donee or aggregate body, and were declared by the canons to be unalienable, except on certain conditions; but it was a custom for the donor to apply by a *precaria*, or petition, to the bishop, or monastery to whom he had given his property, for a lease or *præstaria* of the same for a limited time or for his life, at a certain rent, which was usually granted [1]. These tenants were probably included under the terms coloni ecclesiæ [2], which are so often met with in the codes.

Immunities of the clergy.

The ecclesiastics were continually struggling to place themselves in a state of independence of the temporal laws. In France they effected that all matters affecting their persons and property, excepting accusations of murder and other heinous offences, should be determined in ecclesiastical synods [3]. The excessive privileges and large possessions which the pious fervour of the age bestowed on the mi-

salubre consilium immoque satis jucundum esse dinoscitur, ut homo *de mundanis rebus comparet paradisum.*" There were many of these, variously constructed to suit the different tastes of the charitable. Marculf. Form. ii. f. 1, 2, &c. See the complaint of Chilperic, grandson of Clovis, Greg. Turon. vi. c. 46.

[1] Form. ed. Lind. 19, 20, 22, and 23. &c.

[2] "Liberi autem ecclesiastici quos *colonos* vocant." Alam. tit. 23. § 1. &c.

[3] See the formularies of immunities granted to ecclesiastics, Marculf. lib. 1. Also Leg. Bavar. tit. 1. &c. Cap. Pepin. Reg. Ann. 755. § 18.

nisters of the church were of the utmost detriment to Christianity. Laymen of all descriptions, Barbarians and Romans, aspired to ecclesiastical dignities; and they did not hesitate to offer, nor the king to accept, immense sums of money for the royal precept[1]. The consequences followed that might naturally have been expected: the introduction of fighting and hunting bishops[2] was the least of the evils which resulted. A fierce barbarian count, who had hitherto passed his life in arms, and in the ungoverned exercise of his passions, was not to be restrained by the sanctity of an office for which he had given all the treasures he had collected by his former rapine; and at the end of the 6th century there was scarcely a crime with which the venerable names of bishop, abbot, and deacon had not been shamefully disgraced[3].

[1] Greg. Turon. lib. vi. "Innocentius Gabulitanorum *comes* eligitur ad episcopatum." Ib. viii. c. 20. "Regressus diaconus cum muneribus et consensu civium, ad regem properat; sed nihil obtinuit. Tunc rex data præceptione jussit Gunegisilum *comitem* episcopum ordinari; gestumque est ita." x. c. 22. "Regnimondus quoque Parisiacæ urbis episcopus obiit, cumque germanus ejus Faramodus presbyter pro episcopatu concurreret, Eusebius quidam *negociator*, genere Syrus, datis multis muneribus, in locum ejus subrogatus est." x. c. 26. And see Matt. Paris, p. 129, 20. et seq. and 135. Pepin (Cap. A. D. 755, § 24.) endeavoured to put a stop to the practice of simony.

[2] Fleury's Third Discourse on Ecclesiastical History, to. viii.; and see Matthew Paris, 153, 30.

[3] Greg. Turon. iv. c. 43. Ib. lib. viii. c. 19. 39. et seq. "Badegisilus episcopus vir valde sævus in populo, ad cu-

The sanctity of the clerical character having been broken in upon, it was no longer considered as a crime to despoil the clergy; Charles Martel therefore found comparatively little difficulty in seizing a great part of their possessions, which he granted as benefices to his adherents[1]. The clergy were loud in their demands to Charlemagne for a restitution: this monarch, desirous of securing to the clergy a more certain provision than they could derive from possessions of which they were so liable to be deprived by the monarch or his barons, established, by a general law, the payment of tithes[2]; directing that one-fourth part of the tithes should be applied for the building and reparation of the churches, another fourth for the poor, that one-fourth should be given to the bishop, and the remaining fourth applied for the support of the secular clergy[3]. The general right of the clergy to tithes in England is referred to the grant of Ethelwolf, in the year 855[4].

Tithes.

jus animum acerbum atque immitem *conjunx* acciperat *sævior*," &c. On the subject of the *wives* of the clergy, see Matt. Paris, p. 7.

[1] Esprit des Lois, liv. xxxi. c. 11.

[2] Ib. liv. xxxi. c. 12. Leg. Long. iii. 3. 1.

[3] Inserted in Leg. Long. iii. 3. 4. "Ut decimæ populi in quatuor partes dividantur; prima pars episcopis detur, alia clericis, tertia pauperibus, quarta in fabrica ipsius ecclesiæ."

[4] Hallam's Middle Ages, vol. ii. p. 205.

CHAPTER VI.

OFFICIAL DIGNITIES AND DISTINCTIONS AMONGST THE BARBARIANS.

THE barbarians in general knew no nobility but that which was conferred by the enjoyment of some official dignity, or the companionship of the sovereign. However, among the Bavarians four families or clans[1] had obtained the right of claiming a double composition for all injuries offered to them; and the Agilolfingi[2], formerly the royal, and, at the time the code was compiled, the ducal family, were held in this respect in still higher consideration[3]. The Agilolfingan, who

Nobility.

[1] Called Hosidra, Ozza, Sagana, and Habilingua. Bavar. tit. ii. c. 20.

[2] The termination *ing* was used by the Anglo-Saxons to denominate hereditary nobility. Sharon Turner, iv. p. 120. And see Lord Coke's preface to 6th Report, fo. iv. a. The *Guelphs* appear to be descended from one of the most ancient barbarian families. Heinnec. Elem. Jur. Germ. lib. i. tit. 4. § 91.

[3] "Dux vero qui præest in populo ille semper de genere Agilolfingorum fuit et debet esse." Bavar. tit. ii. c. 20. § 3. Ib. tit. ii. c. 1. § 1. The *Uffingas* of the Anglo-Saxons were a similar race.

possessed the supreme ducal dignity, was valued at 960 solidi; every other member of his family at 640 solidi [1].

Dukes. The highest title which the ancient Germans attributed to their generals was that of duke [2]; but the office then was purely military, and ceased in time of peace: however, when the codes were compiled, the title of duke was also applied to all viceroys, rulers of provinces, and generals, who were higher in degree than a count. The order of dukes, which claims our first attention, was composed of the viceroys, or governors of dependent kingdoms: such were the dukes of the Bavarians [3], and Swabians or Alemans. The noble race of the Agilolfingi, as I have before mentioned, were alone entitled to this dignity amongst the Bavarians. The dignity of duke amongst the Alemans was, generally speaking, hereditary in the ruling family: however, the person enjoying it was subject to be removed, if he refused, or was unwilling effectually to perform the duties of the office, which were, to be able to contend at law, to lead the army, to ad-

[1] Bavar. tit. ii. c. 20. § 4, 5. Et v. Higden, p. 224. and Turner, iv. 120.

[2] Hertzoge, Heinnec. Elem. Jur. Germ. lib. i. tit. 4. § 88. From the laws of Edward, § 35, it would appear, that, at the first settlement of the Saxons in Britain, and when they were engaged in continual wars, the dukes, or heretochs, were, according to ancient custom, chosen by the thanes or soldiers at the *Folcmote*.

[3] Of the Bavarians, see Aventini Annal. lib. 3. cited in Stuart's View of Society in Europe, 4to. p. 216.

minister justice, to mount his horse vigorously, and to brandish his arms with adroitness: it was also required that he should have his sight and hearing [1]. The duke owed fidelity to the sovereign on whom he depended [2], particularly when appointed by the king alone [3]. The authority or dignity of the præfects, or dukes, above described, was little short of royal [4]. To conspire against the life of a præfect or duke was punished with confiscation of all the offender's property, and the culprit became the duke's slave: the murderer of a duke was put to death, and his property confiscated [5]. Every

[1] Alam. tit. 35. Bavar. tit. ii. c. 10. Tassilo, duke of Bavaria, had completely royal authority, but was dependent on the king of the Franks. Mezerai, Abreg. to. i. p. 239. Witikind, Annal. lib. i. p. 637, calls the dukedom of Bavaria regnum, in reference to the sovereign authority then enjoyed by its dukes: he wrote in the 10th century.

[2] Leg. Bavar. tit. ii. c. 20. § 3. Dukes, with powers similar to those I am now describing, were frequently appointed by the kings of the Franks to govern detached provinces, and that from an early period. Thus, "Milodunum castrum eidem Aureliano, cum totius ducatu regionis, jure beneficii concessit." See Gesta Reg. Franc. de Reg. Clodovæo, A. D. 490. The people were sometimes allowed to choose the duke. See Greg. Turon. lib. viii. de Wintrione Duce.

[3] Leg. Bavar. tit. ii. c. 9. tit. ii. c. 1. § 1.

[4] Bavar. tit. ii. c. 5. 7. 8. &c. Alam. tit. 32. The præfects of Burgundy, after that kingdom was annexed to the kingdom of France, probably had the same authority. Greg. Turon. iv. c. 42.; and see Leg. Rip. tit. 50. § 1. of the Duces Patritii.

[5] As the duke's life is valued, tit. ii. c. 20. at 960 solidi, the payment of such composition would, as it is to be presumed, discharge the of-

duke had a palace, and was surrounded by officers similar to those of the king [1]; and his agents or missi were held in equal honour, and equally protected in the execution of their office [2]. The domains enjoyed by the dukes were those which had formerly been the fiscal lands of the kingdom [3]; and they descended in the same way as the regal land of the Franks, that is, to the male heirs equally; but, as before mentioned, it was in the power of the king or the people, according to the custom of the province, to select from the coheirs, or even from collaterals, the person who should succeed to the dukedom [4]. The persons employed by the dukes in the various services of the government usually enjoyed a portion of land from the duke, and were denominated his vassals [5]. The duke was the general of the army of his province; he might at any time order out the counts, with the freemen under their command, and might, if occasion required, put himself at the head of the whole army of the province. If a duke who had been appointed by the king refused to obey an order calling on him to appear in arms at the

fender from the penalties mentioned in the text.

[1] Leg. Bavar. tit. ii. c. 11. Alam. tit. 31. 24. &c.

[2] Leg. Alam. tit. 30. Bavar. tit. ii. c. 7 and 8.

[3] Leg. Bavar. tit. ii. c. 13. Alam. tit. 31.

[4] Leg. Bavar. tit. ii. c. 10. § 3. Alam. tit. 35. c. 2. Marculph. lib. i. form. 8. has recorded the form of their appointment.

[5] Leg. Alam. tit. 36. § 5. Bavar. tit. ii. c. 15.

head of the freemen of his province, he forfeited his dukedom to the king [1]. The duke held in his palace the supreme court of justice in the province, before which all judicial combats were decided [2]. He received the fines which were imposed on those who committed any public offence, or who raised any tumult in the palace [3]; and his domains were frequently increased by confiscations [4].

A duke presided in every province of the kingdom of the Visigoths; his office was both civil and military: in his civil capacity he controlled the judgments given in the courts of the counts and other inferior judges, when applied to for that purpose by way of appeal [5], but he does not appear to have held any regular court at which causes were heard in the first instance. The fees he received in his judicial capacity were proportioned to the value of the subject in litigation [6]. In his military capacity, his duty was to call out and to lead the freemen of his province [7]. The dukes of the Lombards [8] and of the Anglo-Saxons had military authority only. Amongst the Francs, dukes were

[1] Leg. Bavar. tit. ii. c. 4. 5. 9. &c. Alam. tit. 27.

[2] Leg. Bavar. tit. ii. c. 12.

[3] Ibid. tit. ii. c. 11. 12. &c. Alam. tit. 31. &c.

[4] V. Leg. Alam. tit. 26. &c.

[5] Vis. ii. 1. 23. 26.

[6] Ibid. ii. 1. c. 25.

[7] Ibid. ix. 2. c. 8 and 9.

[8] V. Longob. i. 1. c. 5. Greg. Turon. iv. c. 45. The Lombard kings appointed præfects of the provinces of Spoleto, Tuscany, Beneventum, &c. with the title of Duke. Selden, Titles of Honour, pt. ii. c. 1. § 28. Opera Omn. to. iii. p. 471.

occasionally appointed by the king to preserve the peace of particular provinces: such dukes kept up a species of body guard [1], and when not engaged in quelling insurrections in the province, they employed themselves in plundering the counts, who had collected together treasures by alleged abuses of authority.

Counts.

The office of the chiefs or elders [2], who were elected by the Germans to exercise the supreme judicial authority in their respective tribes [3], will immediately be recognised in the *counts* and *eorls* of the Barbarians. When the codes were compiled, the kings, or the viceroys who represented them, appear to have obtained the exclusive right of appointing the counts [4]: where the people elected them, it was by the permission of the sovereign [5]. In order

Mode of appointment.

[1] "Pueri," Greg. Turon. v. 49. in fin. cap. Ib. vi. c. 19.

[2] By the Anglo-Saxons they were first called *Ealdormen*, then *Eorls*. Turner, iv. 290. "Vocabantur aldermanni, non propter ætatem, sed propter sapientiam et dignitatem." Leg. Edovard. edit. Wilkins, c. xxxv. p. 204. And see Rapin's England, vol. i. p. 149. Earl of Shrewsbury's Case. ix. Coke's Rep. 49. a. and b. In latter times the title of *alderman* was given to the præpositi of towns and tithings, and other inferior officers only. Heywood—on Ranks, p. 70.

[3] Tac. de Morib. Germ. c. 12.

[4] See the formula of their appointment, Marculf. lib. i. f. 8. and Bignon's note in Histor. Franc. to. iv. Form. ed. Lindenb. 32.

[5] See Greg. Turon. lib. iv. c. 42 and 48. There were "comites *civitatum* et comites *pagorum*," Vis. ii. 1. c. 12. as there were "principes *vicorum* et principes *pagorum*" in the days of Tacitus; de Mor. Germ. c. 12.

that the count should duly execute his important office, it was necessary that he should be free from all infirmities: according to the ancient constitution, therefore, the office was never granted for life; generally indeed at will only, or for a certain number of years, the king always retaining the power of removing the count for misconduct or incapacity [1]. In the time of Charles the Bald, however, the office of count, in the same manner as the right to the enjoyment of benefices or fieffs, became almost universally hereditary [2]. The count had the particular superintendence of the internal regulation of his county; he was ex officio the extirpator of thieves and malefactors: every one was bound to assist him in the discharge of this duty [3]. Amongst the Visigoths, the count was also

Duties.

[1] Greg. Turon. iv. c. 42.; and see note (g) by Bignon, Histor. Franc. to. iv. p. 224. Long. ii. 47. c. 1. The office of ealdorman was not originally hereditary amongst the Anglo-Saxons. See Heywood on Ranks, p. 94.

[2] Ducange, voce *Comes*, after citing Capit. Caroli Calvi. tit. xliii. c. 3. &c. 10. observes, p. 793, "ex quibus patet non temere ademptas dignitates liberis ac propinquioribus comitum hæredibus, ad quos interveniente tamen regum concessu plerumque transmittebantur." And see Esprit des Lois, xxxi. c. 28. The practice of continuing the office of eorl in the same family also obtained among the Anglo-Saxons, Lingard's England, i. p. 474. note (41).

[3] Decret. Child. § 7. 8. 9. Decret. Clotar. § 16. Burg. tit. 89. Long. i. 25. c. 63. 64. Greg. Turon. in Vit. Beat. Gregor. Lingon. Episc.

the guardian of the morals of the people committed to his care [1]. Before the count was held the mallus, or ordinary court of the county, for the administration of justice [2], which amongst the Francs was usually held once a fortnight, or oftener if required, in the open air, under some particular tree, or in some well-known place [3]; and the count was directed not to go out hunting on that day [4]. In like manner, the Anglo-Saxon ealdorman, or eorl, was bound to hold the scire gemot twice during the year at the least [5].

Amongst the Francs the jurisdiction of the count was, in latter times, abridged and controlled by the authority of the royal missi [6], who were sent into the counties at regular intervals to administer justice; as in England, after the Conquest, the jurisdiction of the earl was controlled by the *justiciarii*, sent by the king to administer justice in the counties [7].

[1] Vis. iii. 4. 17.

[2] Leg. Bavar. tit. ii. c. 15. Alam. tit. 36. Rip. tit. 50. Vis. ii. 1. c. 23. This meeting was called a Shire Gemot amongst the Anglo-Saxons. V. Turner, iv. p. 325. &c.

[3] Heinnec. Elem. Jur. German. iii. § 21. Charlemagne directed that it should be held under cover. Capit. Ann. 809. § 1.

[4] Capit. Ann. 789. § 1.

[5] *Once* Wilkins, p. 78. temp. Eadg. *Twice* ib. p. 136.

[6] Capit. edit. Lindenb. lib. iii. c. 83. 85. &c. Baluze, to. i. p. 497. 668. &c.

[7] See the admirable essay on the English Legislature, Edinb. Rev. No. lxix. p. 22. &c. Et v. Reg. Roff. p. 37.

Every man in the county, who was not exempt under grant from the crown, or by special privilege [1], was under the civil jurisdiction of the count. Among the Bavarians and Alemans the counts had numerous dependants or vassals, who performed the various duties attendant on their office: these vassals were held in considerable estimation [2]. It was the duty of the count to collect in his county the freda, fines, tributes, and taxes due to the king [3], and to transmit them to the royal treasury. The count was the military commander of the county, and ranked next to the duke in the army [4].

The Francic count received considerable emoluments in his judicial character [5]; in particular he was entitled to a part of the fines levied for contempt of court and similar offences [6].

The Anglo-Saxon ealdorman generally received a considerable proportion of all the dues levied in his county on behalf of the king [7].

[1] As were the tenants and vassals of the king, excepting among the Bavarians and Swabians. Alam. tit. 36. c. 5. Bavar. tit. 2. c. 15.

[2] Alam. et Bavar. ubi supra.

[3] Marculf. Form. 1. f. 8. and Bignon's note, Histor. Franc. to. iv. p. 471. Greg. Turon. x. c. 21. &c.

[4] Vis. ix. 2. c. 1. 3. &c. Bavar. tit. ii. c. 5.

[5] See Greg. Turon. viii. c. 39.

[6] V. Rip. tit. 32. § 2. Sal. tit. 54.

[7] See the quotations in Heywood on Ranks, p. 102. 107.

Although each county usually formed part of a province or dukedom, it would appear that sometimes the jurisdiction of the count and duke, like that of the Roman proconsul and master-general of the military, was equally extensive, the one having supreme judicial, the other supreme military authority [1].

As the collection of the freda, or judicial fines due to the king, together with other public dues, was part of the duty of the counts, whose notions of honesty were seldom very vivid, the king was liable to be continually imposed upon. To remedy this, it became a practice with the kings to send agents [2], on whom they could rely, to superintend the collection and payment of such dues. The corruption of the times at length so far increased, that candidates for the dignity of count were not afraid to offer bribes for their appointment. Such an opportunity of collecting at once a sum more than adequate to make up all deficiencies which might happen in the regular returns could not be neglected, and the dignity of count was often openly sold [3]. The count who had purchased his office was allowed to take for his own use, according to the adequacy of the price, the whole or a certain share of the dues levied by him in

[1] Greg. Turon. lib. v. c. 49.

[2] Missi fiscales discurrentes, &c. Leg. Rip.

[3] Greg. Turon. iv. c. 42; the dignity of duke or viceroy was also sold. Ibid. viii. c. 18.

the king's name [1]. From this practice the most mischievous consequences resulted. Quarrels were stirred up, and disputes encouraged, for the sake of the fines accruing on their determination. In fact, such was the system of extortion and plunder which some of the counts practised on the unhappy people under their charge, that the bishop of Tours has not scrupled to affirm that they were sent as scourges from the Almighty [2].

Viscount.

The viscount, amongst the Francs and Goths, was the lieutenant or deputy of the count; he was sometimes appointed to preside over a part of the county, with the authority of a count [3]; but more commonly his authority extended over an entire county. The Grave was usually appointed to this office. The Anglo-Saxon and Norman Vice-Comes, or king's *Gerefa*, was quite independent of the Eorl [4].

Centenary.

Among the Goths, the subdivision of counties into hundreds, and tithings, prevailed from an early period [5], and probably took its rise from the various officers of the army having retained in peace an authority corresponding to that which they enjoyed in war.

[1] Hence the twelfth section of the decreet of Childebert. See also Greg. Turon. iv. c. 42.

[2] Greg. Turon. v. c. 49. 50.

[3] Leg. Alam. tit. 36. c. 1. and 6: Vis. ii. 1. c. 14. and 13. Cap. Leg. Sal. addit c. 1. § 21. Greg. Turon. x. c. 5.

[4] Leg. Ethelb. § 12. &c. Third Report of the Lords' Committee, p. 61, &c.

[5] See Mascou, Annot. 26. § 1. Vis. ii. 1. § 26.

The division of counties into hundreds, *centenæ*, did not generally prevail among the Francs until the reign of Clothaire II. In this reign it was found necessary, for preserving the public peace, that the counties should be divided into districts, and that in each of them an officer should preside, with powers similar to those of the count [1]. This officer, who was elected by the people, was called the *centenary* or *tunginus* [2]; his office was similar to that of the viscount; he held a court, which at first had concurrent jurisdiction with that of the count, and was similarly constituted [3]. Charlemagne considerably abridged the jurisdiction of the centenaries, declaring that they should not hold pleas as to property, or try questions of liberty [4]. Alfred, from similar reasons to those which actuated Clothaire, instituted the office of Centenary and tithing man in England [5].

[1] Decret. Clothar. § 1. "Decretum ut quia in vigiliis constitutis nocturnos fures non caperent—*centenas* fieri," &c. Clothaire probably introduced this word into the Salic law, tit. 48.

[2] Ante theada (i.e. populum) vel *tunginum*, Sal. tit. 48. Spelman, Gloss. 537. considers tunginus to be of the same signification as *thanus*. Eccard, however, is of opinion that the tunginus was the same as the *centenary*. Histor. Fr. to. iv. p. 149. Ducange gives the same interpretation to the word tunginus. As to the election of the centenary, see Baluze, tom. i. p. 426. 466.

[3] Leg. Sal. tit. 48. Alam. tit. 36. § 1. and 6.

[4] Cap. Car. Magn. A.D. 812; Sirmondi. not. in Cap. ed. Baluze. to. ii. p. 770.

[5] "Cum autem contigerit quod quidam stulti et improbi

The office of *greve*, or *grave*, or *gerefa*, is of the highest antiquity, and the name at least is purely of German original[1]; however, this office was not universal; among the Bavarians and Alemans its duties were performed by the ordinary judges. The grave is mentioned in the Salic and Ripuarian laws, as a judge of equal rank with the assessors of the count, or sage barons[2]. He assisted the count or viscount, and centenary, in their respective courts[3]. The peculiar duty of the grave was, by the direction of the count or centenary, to take criminals into custody, and to enforce the appearance of those against whom any complaint or demand was preferred, for which purpose he had the power of distraining the property of the party whose appearance was required. The grave also carried into execution the judgment of the court, and levied all fines due to the judges and to the

Grave, gerefa.

gratis et nimis consuete erga vicinos forisfacerint,—sapientes statuerunt justiciarios super quosque decem *Friborgos* quos *decanos* possumus appellare.—Isti inter villas et vicinos causas tractabant.—Cum autem causæ majores erumpebant, referebantur ad superiores eorum justiciarios quos supradicti sapientes super eos constituerant, scilicet super decem decanos, quos possumus dicere *centenarios*." Leges Edovardi, c. 32. to 35. Wilkins, p. 203. Ingulph. 870. Et v. post, title *Borh*, or *pledge*.

[1] Heinecc. Elem. Jur. German. lib. iii. tit. 1. § 4.

[2] Leg. Rip. tit. 53. Sal. tit. 56.

[3] Leg. Sal. tit. 52. by *judex*, in the first part of § 2. is to be understood *comes*. Leg. Rip. tit. 32. § 3.

king[1]. A *gereſa* presided or assisted in every court amongst the Anglo-Saxons, with similar powers to those of the grave of the Francs. It was also his duty to have with him the dombec, or book of the law[2]. The *lais* of the Goths performed nearly the same duties as the grave of the other nations[3].

Marquis. After the Francs and Goths, who became the two dominant nations of Europe, had established their respective kingdoms, they found it expedient to adopt, for the defence of their frontiers, similar institutions to those which had been established by the Romans: accordingly soldiers were stationed on the confines, whose peculiar duty it was to protect the frontiers from invasion or insult. Amongst the Visigoths this duty was in some districts imposed on individuals; in other districts it was imposed on certain cities on the frontier. It is highly probable that amongst both the Goths and Francs, the individuals or cities on whom this duty was imposed, held lands or enjoyed privileges which had been granted to them as a consideration for this exaction[4]. In the time of Charlemagne

[1] Rip. tit. 32. § 2.; ib. tit. 51. 84. and 89. Sal. 52. 53. 55.

[2] Turner, vol. iv. p. 290. et seq. Wilkins, p. 48 and 204. Leg. Æthel. § 2 and § 12.

[3] Cassiodor. varior. lib. xii. 3. cited by Lindenbroc. p. 1470. Vis. iii. 1. 25.

[4] "Curiales igitur vel privati qui caballos ponere, vel in arca publica functionem exsolvere consueti sunt, nunquam quidem facultatem suam

the soldiers so stationed on the frontiers were called *marchiones* [1], and they were under the orders of the military commander of the district. In the time of the emperor, Henry I. the governor of the frontier districts, had obtained the name of marquis or marcgrave [2]; and in the time of the emperor Lothaire, he ranked next after a duke or viceroy [3], taking precedence of the count. The titles of marquis, and viscount, as titles of nobility, were not introduced into England until a comparatively late period; at the confirmation of Magna Charta by Henry III. neither of these titles existed; the title of duke had also been dropped in England [4].

vendere aut donare, vel commutatione aliqua debeant alienare." Vis. v. 4. 19. a law of Chintaswynd.

[1] "Carolus misit et accersivit filium suum bene equitantem, cum omni populo militari, relictis tantum *marchionibus*, qui fines regni tuentes omnes si forte ingruerent hostium arcerent incursus." Aimoin. Hist. Franc. lib. v. sive Vita Car. Magn. &c. incerti authoris, c. 2. et v. Capit. Ann. 808. § 1.

[2] See Selden's Titles of Honour, part ii. c. 2. § 17.; ib. c. 1. § 47.

[3] Leg. Longob. iii. c. 9. The Book of Feuds gives the marquis the same rank. Lib. i. tit. 1.; lib. ii. tit. 10.

[4] Co. Litt. 83. &c.

CHAPTER VI.

OF FREEMEN IN GENERAL.

AMONG the Goths, Burgundians, Bavarians, and Alemans, freemen of the same class in society, of whatever nation they might be, were all of equal rank [1]; but the Franks in their own country placed themselves and the barbarians living under their law, in the first rank; next to them were ranked the other barbarians; and after them, the Romans. Amongst these last there was a distinction between the Roman companions of the king, who probably were considered as antrustions, the Roman proprietors, (possessores [2]), and the free Roman coloni or

[1] Alam. tit. 68. § 1. Bavar. tit. iii. and 13. Vis. iii. 1. which took away the distinction between Goths and Romans in regard to marriage. Ib. x. 1. 8. and Prol. leg. Burg.

[2] Rip. tit. 7. tit. 36. 1 tit. 13. Whether the Romans could acquire the privileges of Francs by living under the Francic law, is a subject of controversy. A Roman was, in general, fined more rigorously when he offered violence to a Franc, than was a Franc who injured a Roman. Sal. 15. § 2. 3. But Childebert

tributarii, who, as I have before observed, were cultivators of the soil, yielding a certain rent or capitation duty to their lord, and also generally a land or capitation tax to the king. All the nations, excepting the Goths [1], allowed the Romans, if such were their wish, to live under the Roman law [2]. In the time of Charlemagne all questions affecting the clergy were determined according to that law [3]. The clergy appear to have had the same privilege amongst the Anglo-Saxons [4].

Amongst the Anglo-Saxons, the principal landowners, who formed the military strength of the nation, were called by the general denomination of thanes [5]. Of these there were two classes; the king's thanes, who have already been noticed [6], and simple thanes. The king's thanes formed part of the nobility of the kingdom. No one could become a member of this body unless he were the owner of at least forty hydes of land [7]. The

declared that a Roman and a slave should be fined seven solidi only for breaking the Sabbath, whereas a Salian was fined fifteen solidi for the same offence. Decret. Child. § 14.

[1] Vis. ii. 1. § 9. A. D. 540.

[2] Burg. 60. § 1. Sal. 43. § 1, &c, Clothar. Reg. Const. General. § 4. A. D. 560. Hist. Fr. to. iv, p. 115; and see the admirable preface to tome ii. of the same collection.

[3] Baluze, to. i. p. 690; and see Dubos, to. ii. p. 488.

[4] Wilkins, p. 239.

[5] See Lingard's England, vol. i. p. 476.

[6] *Ante*, p. 275.

[7] This appears to me to be the correct explication of the passage in Hist. Eliens. Gale, p. 513. quoted by Turner, iv. 122. A hyde, according

ownership of five hydes of land was essential to the title of simple thane[1]. Thanes of this class were distinguished into *twelfhindmen* and *syxhindmen:* the quantity of land that each man possessed appears to have determined to which class he belonged. A ceorl was entitled to the rank of thane, if he could obtain five hydes in ownership, a church, a kitchen, and a bell-house, a judicial seat, and "a distinct office in the king's hall." A merchant also who passed the sea three times in his own vessel, became a thane. The Ceorls, or husbandmen of the Anglo-Saxons, who together with the small proprietors of land, formed the class of *twyhindmen*[2], answered pretty nearly to the tributarii or coloni of the Francs. Some of the Ceorls were in all probability the descendants of the ancient coloni; but the largest proportion were the descendants of slaves, who had been originally attached to the soil, and who had become free by manumission, or who had acquired a species of freedom by a long remission of dominion on the part of their masters. There were few, if any, of the simple thanes and Ceorls,

to the authorities cited by the above indefatigable antiquarian, consisted of one hundred and twenty acres; there are authorities which would reduce it so low as sixty-four. But the difference arises perhaps from the variation of measures in different parts of the kingdom.

[1] See the authorities cited in Heywood on Ranks, p. 184. Five hydes made what was afterwards called a "knight's fee.

[2] See Lingard, i. 477. 497.

who were not the vassals or dependents of some persons of higher degree. The weight given to the oath of each individual varied according to his rank.

Difference in the condition of the inhabitants of towns, and of those of the country.

I have mentioned in a preceding page that there was a material distinction between the inhabitants of the towns and those of the country; indeed this was the most material revolution which was effected by the Barbarians. The barons in France, and the thanes in England, chiefly resided on their estates in the country, the towns being inhabited only by the lower orders of society. The free inhabitants of the principal towns experienced from the Anglo-Saxons a milder treatment than those of the country. The invaders could not have derived either advantage or security by driving out the inhabitants of the towns, whose attention was turned solely to the arts of peace. The citizens of London in particular were permitted to carry on their commercial pursuits, for which their city had been famous from the earliest ages[1]. The wealth which the citizens acquired, gave them very considerable weight in the nation[2]: we find them frequently courted by the

Anglo-Saxon towns.

[1] "Londinium," says Tacitus, "cognomento quidem Coloniæ non insigne, in copiâ negotiatorum et commeatuum maxime celebre." Tacit. Annal. xiv. c. 33.

[2] The citizens of London had very considerable influence in the time of Canute, Hoveden, p. 434. 36; and in the time of Hardicanute, Malmsb. p. 76.; and that London had grown

contending parties during the intestine wars [1] and commotions which arose during the time of the Anglo-Saxons. Other cities, also, as Chester, Exeter, Worcester, and Shrewsbury, gradually grew into considerable importance; the citizens of the latter town were entitled to the honourable distinction of providing from themselves a body-guard for the king when he came to reside amongst them [2]. In many towns the citizens as a community possessed considerable property [3]. In some, certain of the inhabitants were associated together in companies or fraternities, which were called gilds. Some of these companies were in-

up into great wealth and consequence at the time of the conquest, may be collected from the testimony of all the early writers after the conquest. Thus, Matthew Paris, speaking of the Londoners, A.D. 1253, says, "Londinenses quos propter civitatis dignitatem et civium *antiquam libertatem* barones consuevimus appellare." He gives innumerable testimonies of their wealth and importance from the year 1196 downwards. See particularly the speech of Henry III. recorded by him, ad Ann. Dom. 1248. "Scio quòd si thesaurus Octaviani venalis esset, civitas Londinum illum totaliter absorberet emendo; abundant enim illi *rustici* Londinenses, qui se *barones* appellant usque ad nauseam. Urbs illa puteus est inexhaustus." Histor. p. 650, 30. The principal inhabitants claimed the title of *barones* also in the time of William I. See his charter in Matt. Par.

[1] Ingulphus, p. 877.—Malmesb. p. 76, &c.

[2] Domesday, *Sciropescire.*

[3] "Burgenses Exoniæ urbis habent extra civitatem terram. xii. Carucarum, quæ nullam consuetudinem reddent nisi ad ipsam civitatem." Domesday, Devenscire, Gale, p. 765. Numerous similar passages might be cited.

stituted for purposes of trade, and the members had a gildhall [1], others for the purpose of mutual assistance [2]. The lord of the town was the patron of such companies. Besides these voluntary societies, every citizen and burgher was associated in a *gildscipe*, each member of which was *borh* or surety for his fellows. No city or town enjoyed a complete state of independence during the time of the Anglo-Saxons; even the free inhabitants ranked much below the landed proprietors. Latterly every free inhabitant of the burghs, including all cities and towns throughout England [3], was commended to the patronage and protection of the king, a bishop, abbot, eorl, or thane. In regard to the burghers in general, perhaps this happened from the individual, or one of his ancestors, having been manumitted, and a compact having been entered into at the time of manumission; but, in many cases it arose from a voluntary agreement entered into by the individual. The citizens and

[1] V. Domesday, *Chenth.* Et v. Rymer. Fœdera, to. ii. p. 40. Cart. Hen. II.

[2] Turner, iv. p. 136. The right to erect corporations was exercised by the lords of particular towns during the reigns of the first Norman kings; but soon after the Conquest, it became the settled law, that the crown alone, mediately or immediately, could constitute a gild or company, so as to enjoy a corporate character; which, as is well known, continues to be the law at this day. V. inter alia, Madox Firma Burgi, p. 4. i. Blackst. Com. p. 474, &c.

[3] See Brady on Boroughs, p. 5, et seq. and Domesday, passim.

burghers were almost universally liable to pay tallage, and to render services to their patron. In many towns the services due from the inhabitants were fixed and definite, in others they were arbitrary [1]. In order to secure the payment of the tallage, and performance of the services due to the lord, restraints were imposed on the citizens and burghers, in the disposal of their dwellings. Thus it is stated in Domesday, that if any one wished to retire from the city of Hereford, he could not sell his house without leave of the gerefa, and then only to a person able and willing to perform in his stead the accustomed services; and if any burgher became so reduced as not to be able to render the accustomed services, and desired to leave the city, he was bound to deliver up his dwelling to the gerefa, that he might commit it to some person able to perform such services. A *port gereſa*, or alderman, presided over each city and town, including London [2]; he was appointed by the king, or other lord or patron of the place. It was not until the introduction of the system of granting of charters, which became general during the reigns of Richard the First and his successors, that cities and towns were erected into corporations, with powers to appoint their chief and subordinate magistrates. The king or his grantees had the sole right of instituting markets, and imposing tolls [3].

[1] Domesday.

[2] Leg. Lothar. et Edric.

[3] Chron. Sax. p. 119. Chron. Thorn. p. 1796, &c.

When a general tax was imposed by the Witenagemot, as *danegeld* or the like, the cities, towns, and principal boroughs, contributed according to certain settled customs and rules [1].

Carrying of arms.

In ancient times, no one could rank among freemen as one of the republic, till he had been invested with arms at a public assembly [2]. There are few traces of such a custom in the codes: but before a certain age [3], the laws considered a youth as incapable of defending himself; we may therefore suppose, that at this age, and not until then, he assumed, or was invested with arms, and that until this time he could not appear at the general assembly [4].

The Barbarians transacted all public and private business in arms [5]; and the count, when he held the mallus, caused a buckler to be set up

[1] V. Domesday, title *Wirecestrescire*. Gale, 767; ib. *Devenscire*, p. 765, &c.

[2] "Nihil autem neque publicæ neque privatæ rei nisi armati agunt; sed arma sumere non antè cuiquam moris est quam civitas suffecturum probaverit," &c. Tac. de Mor. Germ. c. 13. et vide Heinnec. Elem. Jur. Germ. lib. 1. § 76.

[3] Fifteen with the Ripuarians, eighteen with the Lombards. Long. ii. 29. c. 4.

[4] Rip. tit. 81. [4] Long. ubi sup. Vertot produces the instance of Louis le Debonnaire receiving his sword from his father Charlemagne, and thinks from this that the ancient custom was still followed. Mem. de l'Acad. des Inscrip. to. ii. p. 588.

[5] Rip. tit. 68. § 1. Alam. tit. 49. § 1. 59. § 4. Fris. 22. § 70. Long. i. 7. 3, &c. "Gravis pœnitentia est, quod laicus arma sua deponat." Leg. Eadg. de Pœnitent. § 10. Wilkins, p. 94.

above his judgment seat [1]. Oaths were taken on arms [2]; and it was considered shameful to leave them in battle [3]. By the *laws of Edward*, all persons were enjoined not to part with their arms, but to leave them to their heirs [4]. The war-horse, which was highly valued, could not be taken in pledge by a creditor [5]. Charlemagne forbade the *carrying* of arms during peace [6].

Privileges and burthens.

Amongst the Francs, and the nations under their dominion [7], freemen in their civil capacity were by law exempt from torture and every kind

[1] Sal. tit. 48.

[2] "Hoc pactum sacramento quidem super arma (ut eis mos erat jurantibus) firmatum," Aimoin, iv. c. 36. Alam. tit. 89. Bavar. tit. 16. c. 6. Rip. 33. § 1. Long. ii. 55. c. 55. This was a remnant of the custom mentioned by Ammian, lib. xxxi. c. 2. "Nec templum apud eos (Alanos scil.) visitur. Gladius barbarico ritu humi figitur nudus, eumque ut Martem regionum quas circumeunt præsidem verecundius colunt." Every one will remember the story of the sword of Mars found by Attila, Gibbon, c. xxxiv. The Roman military ensigns, as is well known, were also considered as sacred. Sueton. Caligula, c. xi. et c. xiv. et not. Pitisci.

[3] Sal. 32. § 6. Fifteen solidi was the composition for unjustly accusing a man of having left his shield. Charlemagne reduced it to three. Esprit des Lois, liv. xxxviii. c. 21.

[4] Leg. Edov. § 35. et v. M. Par. 744.

[5] Long. ii. 21. Forty-five solidi was the value of the war-horse. Sal. tit. 40. § 2.

[6] Cap. Car. Mag. ad Leg. Sal. tit. ii. c. 2. Long. i. tit. 37. Justinian had issued the same prohibition, Nov. xvii. c. ult.

[7] The laws of the Visigoths permitted the infliction of both.

of corporal punishment[1] except loss of life, which was only inflicted for very heavy offences[2]; but this exemption was merely nominal, for we learn from Gregory of Tours that tortures of the most terrible description were not unfrequently applied for the discovery of crimes to freemen, even when invested with high official dignities[3].

All persons were liable to the burthen of purveyance, or furnishing horses, carriages, and entertainment, to the king's envoys: an obligation that was handed down from the Roman emperors[4]. Purveyance.

Every freeman amongst the Barbarians was, as Military service.

[1] No corporal punishments are mentioned in the Salic or Ripuarian laws; very few in those of the Anglo-Saxons; those which are mentioned in the laws of the Bavarians concern the freemen when embodied in the army. Bavar. ii. 4. §. 6, &c.

[2] Murder of a duke, treason, theft committed with violence, rape, and some few other crimes of a like heinous nature. Bavar. ii. 1. 3. Decret. Child. § 4. 5, &c.; and see to the same effect, Leg. Cnut. Polit. § 2. "*neque perdatur pro re parva Dei manuum operatio.*" Ibid. § 61.

[3] "Sunnegisilus comes stabuli iterum tormentis addicitur, ac quotidie virgis lorisque cœditur, et *imputrescentibus vulneribus* cum primum decurrente pure cœpissent ipsa vulnera claudi iterum removebatur ad pœnam: in his tormentis confessus est." So the sons of Waddo, formerly major-domus, were tortured on the suspicion of treason. Greg. Turon. x. c. 19. ib. c. 21.: and the most horrible tortures were inflicted on Leudastes, once count of Tours. Greg. Turon. lib. v. c. 49, et seq. which were an improvement on the tortures mentioned by Suetonius to have been intended for Nero, and actually inflicted on Vitellius. Sueton. Vitell. c. xvii.

[4] V. Baluz. Capit. to. ii.

we have seen, originally liable to military service. This obligation was gradually modified. Charlemagne directed that no one who owned less than three mansi, each of which, according to Ducange, consisted of twelve French acres, should be compelled to join the army himself. In England it became the custom in the time of Edward the Confessor, that five hides of land should provide one soldier[1]. The inhabitants of cities and towns, as well as the proprietors of land, were liable to military service. There are in Domesday repeated notices of the number of soldiers which, according to ancient custom, different cities were to furnish when the king was engaged in a military expedition[2].

In the early Anglo-Saxon history, the raising of *naval* armaments, or levying of ship-money

p. 18. Ib. p. 186. That the same burthen existed in the Anglo-Saxon times, I infer from the Anglo-Norman writers; but I cannot at present turn to any direct authorities from the Anglo-Saxon history. As to the same *paraveridorum onus* amongst the Romans, see Cod. Just. xii. 51. 19.

[1] Baluze, tom. i. 457. and Turner, iv. p. 217. In *Worcestershire*, if *any* possessor of land refused to join the army, if he did not hold of any lord, he forfeited his land to the king: if he held of any lord, he was liable to a fine to his lord. Domesday, *Wirecestrescire*.

[2] "Quando Rex ibat in exercitu per terram, de ipso burgo xii. burgenses ibant cum eo. Si vero per mare in hostem ibat, mittebant ei iv. equos—usque Londoniam ad comportandum arma," &c. Domesd. *Ledecestre*. "Consuetudo *Warwic* fuit ut eunte Rege per terram in expeditionem, decem burgenses de

was done by the authority of a Wittenagemot[1]: but the Anglo-Danish, and the early Norman sovereigns, claimed the right of raising such armaments as part of the royal prerogative[2].

Arts and sciences, &c.

The medical art appears to have been but little known to the Barbarians; the usual mode, as it would appear, of healing a wound, was to sear it with a hot iron, *to cook up the veins*[3]. The practitioners were the objects of considerable anxiety with the Barbarians. The Visigoths subjected them to very severe regulations. The first thing after sending for a physician, was to make a bargain with him as to the sum for which he would perform the cure; no fee could be demanded unless the patient recovered. If he weakened a man by bleeding, he was fined 150 sol., but if by ill

Warwic pro omnibus aliis irent," &c. Ibid. *Warwicscire.* Gale, 772, et v. ibid. *Sciropescire*, ead. pag.; other instances might be referred to. Et v. Chron. Sax. p. 105. &c.

[1] Chron. Sax. p. 126. 132.

[2] V. Bromt. p. 887. Hoveden, 429.; ib. 907. temp. Cnut. 932. temp. Hardi-Cnut. —A writ, dated 23d May, 4 Ed. I. directed to the mayor, bailiffs, and commonalty of Chester, requiring them to provide a certain number of ships and mariners to expedite the war against Robert Bruce, was produced on a trial at the last Shrewsbury assizes.

[3] "Si manum transpunxerit, ita ut *focus* non intret *ad coquendum venas*," &c. Alam. tit. 65. § 5. "Si autem *ferrum calidum* intraverit *ad stagnandum sanguinem*," &c. Ib. § 5. The same remedy was practised in England so late as in the time of Matthew Paris. Hist. 340, 15. 411, 56.

fortune the patient died, the physician was given up to the relations, to be disposed of by them as they pleased. A medical man had one privilege; it was not lawful to confine him for debt if he could find sureties[1]. The Anglo-Saxons generally, in the first instance, had recourse to incantations to drive away diseases[2].

Few but the Romans appear to have paid the least attention to letters. In the days of Gregory of Tours, to have read Virgil and the Theodosian code[3], and to know something of arithmetic, were sufficient to form a scholar[4]. Drunkenness was still the reigning vice, to which all classes were addicted, and from which, as amongst the ancient Germans, sprung the most bloody contentions[5]. Cowardice was detested[6]; nor was the liar less the

[1] Vis. xi. tit. 1. In after times, the emperor Frederic II. would not allow a physician to practise, unless he had studied *logic* exclusively for three years. Constit. Neap. lib. iii. 43.

[2] Turner, iv. p. 469, &c. So late as the 3d of Hen. 8. it recited in an act of parliament, c. 11. that it was *the practice* of *women* and others to use witchcraft and sorcery in the curing of diseases.

[3] The study of the Theodosian code was greatly encouraged in France. V. Greg. Turon, l. iv. c. 24.

[4] Gibbon's Decline and Fall, c. xxxviii. note 3; and Greg. Turon. l. iv. c. 47.

[5] Vide Tac. de Mor. Germ. c. 22. Gregory of Tours mentions numerous instances of the continuance of the practice; and see Turner's Anglo-Saxons, iv. p. 69, et seq. The continued propensity of the English to drunkenness is mentioned by Matthew Paris, p. 309, &c.

[6] The heaviest fines were

object of abhorrence; no punishment was thought too heavy to be inflicted on a person who broke his faith [1].

Jews among the Francs appear to have enjoyed civil rights [2]. In England they were considered to be the *king's property*[3]. The code of the Visigoths contains a system of persecution against them, which nothing but the worst of fanaticism could have dictated [4]. Jews.

Women were treated by the Barbarians with esteem and confidence. Tacitus describes the Germans as attributing to them the capacity of superior discernment; and their advice was not Women.

imposed on all offences which implied cowardice. Sal. tit. 26. § 1, &c. Vide *post*, title *Women*.

[1] See Gregory of Tours, iv. c. 14; ib. v. c. 83. Some German chiefs came to Rome in the time of Nero, to request that a grant of the vacant lands they had occupied might be made to them. When in the Theatre of Pompey they observed that some strangers were allowed to sit amongst the senators, and on being informed that this privilege was conceded to those who were most distinguished for their valour and their fidelity to the Romans, they exclaimed, "nullos mortalium armis aut *fide* ante Germanos esse," and immediately took their seats amongst the senators. Tac. Ann. lib. xiii. c. 54.

[2] Greg. Turon. lib. vii. c. 23.

[3] Wilkins, Leg. Anglo-Sax. p. 47. Hoveden 606.

[4] See Vis. xii. tit. 2; particularly § 10. and 16. tit. 3. § 18. 23, &c. These laws were no doubt imported from Constantinople, as the ground-work is to be found in the Novels. Matthew Paris says of the Jews, "quorum proprium est prohibita perpetrare atque facere," p. 128.

rejected: but they were thought peculiarly capable of witchcraft and conjuration [1], which in later times caused great barbarities to be practised against them [2]. The German women followed their husbands and kindred to war [3], and accompanied them in all their emigrations. They were eminently distinguished for their ardour for liberty, which occasionally prompted them to deeds of heroic valour [4]. Among the Barbarians, the life of a woman was always equally valued as that of a man of the same condition [5]; and during the period of her life when she was capable of increasing the number of warriors, and when in lawful matrimony she gave signs of such an increase, the life of a free-woman equalled [6], and exceeded in value that of an antrustion [7]. Injuries or insults offered to a female were visited with the severest punishment, for they implied the crime

[1] The Romans entertained the same notion. Sueton. Galba, c. ix.; so did the Anglo-Saxons. V. Wilkins, p. 31.; Matthew Paris, p. 128.

[2] Greg. Turon. vi. c. 35.; vii. c. 4, &c. "Fœminam quæ consuevit excipere incantatores et magos et sagas, ne sinas vivere." Leg. Alf. § 30.

[3] Tac. de Mor. Germ. c. 7. and 8. Gibbon's Decline and Fall, c. ix.

[4] Florus, lib. iii. c. 3. § 61.

[5] Add. Fris. tit. 6. Sal. 26. § 6. 8. Amongst the Alemans, they were doubly valued. Alam. tit. 68. c. 3.

[6] Sal. tit. 26. § 7. Rip. tit. 12. § 1. and 2.

[7] Sal. 26. § 4. Rip. 63. § 10. Sal. tit. 2. c. 2. He who gave a woman a potion, to cause abortion, was liable by the law of the Visigoths, vi. 3. 1. to death; a fine of sixty-two solidi by the Salic law, tit. 21. § 4.; loss of liberty by the law of the Bavarians, tit. 7. c. 18.

of cowardice [1]. The composition for selling a man as a slave was twelve solidi, a woman twenty-four; for digging a man out of his grave forty solidi, a woman eighty. Every species of insult which the Barbarians conceived that a woman was subject to, was minutely defined, and a proportionate penalty affixed [2]. Surgeons were, by the Gothic law, expressly forbidden to bleed any woman but in the presence of their nearest relations, or most respectable neighbours [3].

Female chastity [4] was an object of the most anxious care [5], more especially as it was essential

[1] "Quia armis se defendere nequiverit." Bavar. iii. c. 13. § 2. Alam. tit. 49. § 2.

[2] Alam. tit. 48 and 50. Sal. tit. 22. tit. 26. § 3. Bavar. tit. 7. c. 5. Add Leg. Burg. tit. 5. § 1. Burg. tit. 33. Alam. tit. 58. There are some curious laws in regard to insults offered to women in the law of the Lombards. One, a law of Liutbrand, is as follows: "Annunciatum est nobis quod aliquis perversus homo, dum se quædam femina in fluvio lavaret, pannos ejus quos ibi habuerit totos tulisset, et ipsa remansisset nuda, et qui ibant et transibant per locum illum *pro peccatis* videbant turpitudinem ejus; ipsa autem in ipso fluvio semper stare, non poterat, reverti autem in casam suam nuda erubescebat." It is ordained, that whoever shall be guilty of such presumption in future, shall pay the amount of his entire widrigild, or value, to the female. Long. i. 16. 6. The 5th, 7th, and 8th laws of the same title provide penalties for insults of an equally ludicrous nature.

[3] "Quia difficillimum non est ut sub tali occasione ludibrium interdum adhærescat." Vis. xi. 1. 1. "

[4] Even of a slave. Vis. iii. 4. 16. &c. Turner, iv. p. 117-8.

[5] This was a native feature of the barbarian character: "Publicatæ pudicitiæ nulla venia." Tac. de Mor. Ger-

to the obtaining the nuptial price of a damsel [1]. The law of the Visigoths declared that he who committed a rape should, if the female were a widow, be delivered to her as a slave; if a virgin, that he should be delivered to the parents. It was death to the woman if she afterwards either married or willingly had intercourse with such a man [2]. Unjustly to accuse a woman of the worst of murders, and of prostitution, were equally criminal [3]: and the female who, in defence of her chastity, killed the man who assaulted her, was sure to find powerful protection [4].

If a woman were accused of a crime, she might

man. c. 19. "Impudicitiam," says Salvian, c. vii. "nos diligimus, Gothi execrantur; puritatem nos fugimus, illi amant —jam apud Gothos impudici non sunt nisi Romani, jam apud Vandalos nisi Romani.— *Saxones* crudelitate efferos, sed *castitate mirandos*." "Meretrix," says the law of the Visigoths, "si postmodum ad pristina rediisse cognoscitur, iteratim a *comite civitatis* 300 *flagella* suscipiat, et donatur a nobis alicui pauperi." Vis. iii. 4. 17. et v. Ibid. iii. 3. Fris. tit. 9. Sal. tit. 14. § 14. In England the *marshals of the Marshalsea* of the household had anciently some such duty to perform as the Gothic count of the city. 10 Co. Rep. 77 a. Fleta, ii. c. 5.

[1] Burg. tit. 12. § 1, 2, 3. Bavar. tit. 7. § 6.

[2] Vis. iii. 3. § 1. Ib. iii. 2. 2 and 3.

[3] "Si quis ingenuam mulierem *striam* clamaverit, aut meretricem, et convincere non potuerit, 188 solid. culpab. judicetur." Sal. 67. § 2. A *stria* was a species of female witch, who had the credit of being able to get into a man's inside, and devour him. Long. i. 11. c. 9. Lindenbr. Gloss.

[4] Greg. Turon. lib. ix. c. 27. Vis. iii. 3. § 6.

defend herself by a deputy or champion [1]. If no one would undertake this office, she had to undergo the trial by ordeal, and if the result proved her guilty, she suffered the punishment attached to the offence [2].

It appears that the Lombard women retained a considerable share of their ancient ferocity: they generally assisted in affrays [3]; and when the laws [4] forbade *men* from collecting together to annoy their neighbours, they found most able substitutes in their wives, daughters, and female slaves, whom they trained and sent on plundering expeditions: it required a separate law to prohibit *females* from committing these outrages [5].

[1] Thuring. tit. 14. Long. i. 3. c. 6. Greg. Turon. lib. x. c. 8. and v. c. 33.

[2] Greg. Turon. lib. v. c. 34. ad fin. cap. and Leg. Thuring. et Long. ubi supra.

[3] Long. i. 17. c. 3. If in such case a female received any injury, she could not recover any recompense against the person who inflicted it.

[4] Long. i. 17. c. 4.

[5] Ibid. i. 17. c. 5.

CHAPTER VIII.

OF SLAVES AND FREEDMEN.

THE slaves of the Barbarians would be composed, 1st, Of those whom they had brought from their native habitations; 2dly, Of the slaves they found in the countries which they conquered; 3dly, Of captives taken in war [1]; and 4thly, Of barbarians who disposed of, or forfeited their liberty [2]. The close connection of the Ostrogoths with the Romans [3] who did not permit a man to sell his li-

[1] See Bavar. xv. 11. § 1. Gibbon, Decline and Fall, chap. xxxviii. note 96. Mascou, Hist. of the ancient Germans, book iii. c. 2. note (9). "Servitutem invenit bellum." Novell. Justin. 89. c. 1.

[2] See Vis. iii. 4. c. 1, 9, &c. Bavar. tit. 6. l. 3. Gibbon, Decline and Fall, c. xxxviii. note 99. The parting with liberty to gratify a thirst for gaming was an old practice with the Germans. Tac. de Mor. Germ. c. 24. It was also a common practice with the ancient inhabitants of Greece. Thucyd. i. 8.

[3] In the Digest it is stated, "Libertas inestimabilis res est," I. 17. l. 106, though by the law, as it stood before the time of Constantine, a man might sell *his son* as a slave. That freemen *in fact* sold themselves, appears from Dig. xxviii. 5. 59. and ib. tit. 3. leg. 6. § 5. and the notes of Gothofred.

berty, caused the disposing of liberty to be discountenanced by the laws of that nation[1]: but the customs of the Barbarians generally authorised this traffic[2], and it was often the last resource which a man had to save himself from actual starvation[3].

In early times, the slaves of the Germans were chiefly occupied in tending their flocks, and in providing them with such of the necessaries and luxuries of life as the soil afforded, and although generally excluded from honours, their condition was easy[4]. The slaves of the Barbarians composed part of the disposable property of their masters[5]. Those who were in absolute servitude, as the lowest rustics appear to have been[6], could acquire no property for themselves[7], excepting by gifts specially made to them by their masters, or by others, on account of some particular service[8].

[1] "Homo enim liber nullo pretio æstimatur." Edict. Theod. § 94 and 95.

[2] Bavar. tit. 6. l. 3. § 1. Vis. vi. 4. 10.

[3] See the Formularies of Marculphus: No. 134. is a sale of a man by himself for a settled sum; 135. and 137. are sales to a man who had paid a composition which had redeemed the vendor from death; 136. is a sale in consideration of food and clothing.

[4] Tac. de Mor. Germ. c. 25.

[5] Bavar. tit. 15. § 7. Vis. v. 4. l. 16. These two laws are word for word the same; et v. ibid. l. 15.

[6] See Turner's Anglo-Saxons, iv. p. 128. et seq.

[7] Hence the general rule, that "omne damnum quod servus fecerit dominus emendet." Thuring. tit. 16. Sax. tit. 10. Vis. iv. 2. 15.

[8] Vis. v. 4. l. 13. Form. ed Lind. No. 45. And see

There were slaves who were attached to the soil, like the Roman *adscriptitii*[1]. There appears to have been a species of slaves between the lowest degree, or those in absolute slavery, and freedmen. Such were those[2] who exercised the various occupations of goldsmiths, silversmiths, ironmongers, carpenters, and the like, some of whom were highly prized. The value of a goldsmith was 150 solidi[3]. Slaves of this description had their separate houses and establishments; it would appear that sometimes they worked wholly for their masters, but the more usual way was for the master to permit them publicly to exercise their art, he allowing them a certain share of the profits they acquired[4]. The slaves who officiated in the house and about the person of their master, and who assisted him in his enterprizes for revenge and plunder, were also held in

Cod. Just. xi. 47. 11. which is to the same effect.

[1] V. int. al. Turner, iv. p. 129. "Et quilibet vir noscat *jugum suum hominum* et *equorum* et *boum*." Feod. int. Alf. et Guthrun, Wilk. p. 47.

[2] *Servi lecti.* Burg. tit. 10. § 1. Amongst the *Anglo-Saxons* there were in general a certain number of artificers attached to each manor, and they were usually granted with it. V. int. alia Ingulph. p. 913. Thorn. p. 1776, &c.

[3] Burg. tit. 10. § 2, 3, 4, 5, and 6. No artificer was valued above 70 solidi in the Salic law.

[4] Burg. tit. 21. § 2. Rip. tit. 62. Alam. tit. 79. § 6. It is evident, from the authorities cited by Turner, iv. p. 132, that *Anglo-Saxon* slaves also were allowed to acquire property.

higher estimation, and had larger privileges than slaves employed in agriculture [1]. Some of the agricultural slaves were distinguished above the rest; such were the hindsmen, who were allowed by their masters to have houses of their own, and had apprentices and slaves under them [2].

A slave was not admitted to give testimony on oath as a witness in legal proceedings, excepting where, from the circumstances of the case, evidence could not be obtained but from his testimony [3]. If a slave were accused of any wrong, the oath of his master and the requisite number of compurgators was admitted to clear him from the charge [4]; but if the master refused to swear to the innocence of his slave, or if he were in any other manner convicted, the master was compelled to pay the composition attached by law to the offence [5], or to

[1] Long. i. 8. l. et seq. Burg. tit. 10. *Pueri*, Greg. Turon. lib. vii. c. 27. lib. v. c. 49. &c.

[2] "Magistri porcarii, caprarii, armentarii, molinarii." Long. i. 11. l. 6 and 7. Sal. tit. 11. § 5. Alam. tit. 98. Fris. tit. 11. "Si pastor porcorum," says the law of the Alemans, "qui habet in grege 40 porcos, et habet canem doctum, et cornu et *juniorem*, occisus fuerit, 40 solid. componet." Alam. tit. 79. § 1. 5 and 6.

[3] Vis. ii. 4. 4. There was an exception in favour of the king's slaves, ibid. l. 9. The slaves of the Romans were under the same disability as to giving testimony. Dig. xxvii. 1. 20, 7.

[4] Rip. tit. 30.

[5] Rip. ubi supra. In case of theft committed by a slave, the master was bound by the Salic law to restore the thing stolen, and the slave received corporal punishment, unless he could find money to pay the legal composition. Et

or to make good the actual damage done, and deliver up the slave to receive corporal punishment [1].

Slaves were liable to be put to torture [2], by any one who chose to charge them with a crime, for which a freeman on conviction would have to pay to the amount of fifteen solidi. It was no further a crime to cause a slave to expire on the rack, than as it deprived the master of a part of his property [3]: however, the carcase of a slave was spared, if he committed a crime in obedience to the command of his master [4]. The laws of the Visigoths prohibited a man from killing or maiming even his own slave [5]; but the laws of the other continental nations [6], which prohibit the killing or maiming of a slave, only relate to the slaves of another; and as the same composition was paid for the killing, selling, and

v. Pact. inter Child. et Clot. § 5 and 6.

[1] Burg. tit. 32 and 33. Alam. tit. 31. § 2. Sal. tit. 42. § 2. et seq. Vis. vi. 4. 1.

[2] Sal. tit. 42. § 1. and 2. Vis. vi. 4. 1. 1. and 6. Bavar. tit. 8. 1. 18.

[3] Vis. vi. 4. 1. Bavar. ubi supra.

[4] Vis. vii. 2. 5.; ib. iii. 3. 12.

[5] Vis. vi. 5. 12. This law, which was enacted about A.D. 642, declares that no slave shall be maimed or put to death, excepting after judicial condemnation. The same code, vii. 3. 2, subjected the man who beat another man's slave to one hundred stripes, and to deliver four other slaves to the owner, or to become himself a slave.

[6] Burg. tit. 10. § 1. Bavar. tit. 5. § 1. and 2. Fris. tit. 1. § 10. Sal. tit. 11.

manumitting another man's slave [1], it is clear that the slave himself was not considered. Amongst the Francs it was a constant practice, when a man was grievously offended by another, for such man to burn down the offender's house, and to murder, if he could, all his slaves [2]. Amongst the Anglo-Saxons, the power of masters over their slaves was progressively reduced by various humane laws made in their favour [3]. If a freeman married a slave, he was liable to the severest penalties [4]. Slaves themselves could not marry without the consent of their respective masters [5]. Generally they could not be sold out of the kingdom without the permission of the king or viceroy [6].

Ervigius, king of the Visigoths, who reigned A. D. 680—687, commanded that every man should take with him one-tenth of his slaves, properly armed and accoutred, when called out to join the army [7]; but slaves, though present to

[1] Sal. tit. 11. § 3.

[2] See Greg. Turon. vii. c. 7, &c.

[3] Leg. Alf. § 14. 20. &c.

[4] It was death to marry a slave, by Vis. iii. 2. 2. and 3.; and Burg. tit. 35. § 2.—A Franc, by marrying a slave, became himself a slave. Sal. tit. 27. § 3.

[5] Sal. tit. 27. § 6. Vis. iii. 2. 5.

[6] Alam. tit. 37. § 1. By the law of the Visigoths, if a slave who was sent into a foreign country could make his escape into his own country, he became ipso facto free. Vis. ix. 1. 10.

[7] Vis. ix. 2. 9.

assist their masters, did not in general carry arms in battle [1].

King's slaves [1].

Tacitus mentions, that in such of the German nations as were governed by kings, freedmen [2] often rose above freemen, or even those of noble birth. The slaves of the Barbarian kings sometimes attained the same pre-eminence. Gregory of Tours has detailed the history of one Leudastes, who from a common slave became one of the king's cooks, and after having had one of his ears cut off for running away from his master, was advanced to the dignity of Count of Tours [3]. All the king's slaves were of equal condition with the freedmen of subjects [4]. Those who were employed in the king's household, were held in considerable estimation [5]; they might bear witness and acquire property for themselves, but could not manumit their slaves without the consent of the king [6]. The king's slaves sometimes attained, after manumission, to the dignities of count, grave, and judge [7]. The king's slaves, however, were under this dis-

[1] *Homines vel pueri regis.* Rip. tit. 9. and 53. § 2. here *puer* seems to have the same meaning with cnight amongst the Anglo-Saxons. Turner's Anglo-Saxons, iv. p. 180.

[2] "Liberti." Tac. de Mor. Germ. c. 25.

[3] Greg. Turon. lib. v. c. 49. 50.; lib. vi. c. 32.

[4] Long. iii. 30. 1.

[5] Vis. ii. 4. 4. Burg. tit. 2. § 1. Sal. 14. § 6.

[6] Vis. v. 7. 16.

[7] Greg. Turon. ubi sup., Rip. tit. 53. § 2. Sal. tit. 56. § 2.

ability, that they could not acquire freedom by prescription, a privilege, if the period, being fifty years, does not preclude the use of that appellation, to which a common slave was entitled [1].

Amongst the Germans, there was a race of men called by Tacitus libertini, or freedmen, but whose condition is described to be little above that of slaves [2]. The freedmen, and descendants of freedmen, amongst the Barbarians, were a very numerous body. Slaves were manumitted by the Barbarians in different ways; and, according to the method of manumission, so were the privileges obtained. Some methods conferred absolute freedom; such was the method "*jactante denario*," which was performed in the king's palace; a charter of freedom was granted to such freedman by the king, and he was called a denariatus [3]. The following method, used among the Lombards also had the same effect [4]: the master Freedmen.

[1] Ducange, voce *Servus*. Vis. x. 2. 2. and 4.

[2] Tac. de Mor. Germ. c. 25.

[3] Sal. tit. 28. Rip. tit. 62. Form. ed. Lindenbr. 102. where such a freedman is denominated *ingenuus*, and valued as a freeman. Rip. tit. 62. The Lombards had a similar ceremony *per imp-ans*, conferring similar privileges.

[4] Astulphus, Long. ii. 34. 9. declared, "injustum nobis apparuit ut homo benefactorem suum vivente eo dimittere debeat." In his time, therefore, no freedman could become absolutely free during the life of his patron.

delivered the slave into the hands of a freeman; the slave was by him delivered to a second, by the second to a third, and by the third to a fourth; the fourth took him to a place where four roads met, and informed him, before witnesses, he might depart which way he pleased. Slaves were sometimes manumitted amongst the Anglo-Saxons in a similar manner[1].

But the most usual mode of manumission, particularly amongst the Anglo-Saxons, was by a written charter of freedom or by will[2]. Though slaves might by this method also be made absolutely free, yet there were usually reserved in the charters of manumission to the manumittor, or to him and his heirs, certain rights over the freedman and his descendants, as of claiming stated services, or the payment of a tribute or tallage[3]. Freedmen of this description are denominated in the codes of the continental nations, *liti*[4], *aldii*[5], and *tributarii*[6]; amongst the Anglo-

[1] Long. ii. 35. 1. Form. edit. Lindenb. 91. 93. 94. Gale, p. 407. Turner's Anglo-Saxons, iv. p. 133. The master might, if he chose, reserve to himself the rights of patronage, even by this method.

[2] Turner, iv. p. 133. Leg. Wihtred Wilk. p. 11.

[3] *Freemen*, it seems, when compelled by want, sometimes subjected themselves to the servitium. liti, Fris. tit. ii. § 1.

[4] Sal. tit. 28. Rip. i. tit. 36.

[5] Long. ii. 35. 1.

[6] Rip. tit. 62. The ex-

Saxons they belonged to the class of ceorls. The tributarius frequently had a mansus or farm, usually consisting of about twelve acres, committed to him, at the time of manumission, for which he paid to the proprietor an annual rent[1]; or the land so granted was burdened with some servitude in favour of other property of the donor, which he retained in his possession[2]. Scarcely differing from these were the *tabularii*, who were manumitted in the church before the priests, elders, and people, according to the Roman law. Their charter of manumission contained a condition, that they should pay an annual tribute to, or perform some certain service for, the church in which they were manumitted[3]. A patron might, as it would seem, assign the services of his freedman to a stranger, unless restrained from so doing by the terms of the charter

pressions "Colonus, (Ceorl) qui terram censualem possidet," in Fœd. Alfred. et Guthrun Reg. § 2. Wilkins, p. 47, seem to refer to a freedman of this description.

[1] See a precedent for such a grant, Form. ed. Lindenb. 61.; and see Heinnec. Elem. Jur. German. lib. 1. § 60.—Leo the slave, who released Attalus, received from his master his freedom, and a farm of this description. See Gibbon, c. xxxviii. note 107.

[2] Thus we find a man giving "mansum unum, cui adspiciunt mansi serviles quatuor," &c. Form. edit. Lindenb. 79; and see Heinnec. Elem. Jur. Germ. lib. ii. § 132, et seq.

[3] Rip. tit. 58. § 1. 4, &c. Greg. Turon. lib. vii. c. 26.

of manumission[1]. The different services, and the conditions, and restraints, both in respect to the persons and property of the freedmen, which were imposed by the lords at the time of manumission, and which varied, of course, according to the humour of the manumittor and other fortuitous circumstances, gave rise, no doubt, in a great degree, to the numerous and varied obligations to which, as before observed, the burgesses of every town and borough in England were liable in regard to the king or other lords of the towns and boroughs in which they resided[2].

Duties of the freedman, and rights of the patron, independent of contract.

The codes of the Goths and of the Lombards contain very explicit regulations in regard to the duties of the freedman towards his patron, independently of any contract or stipulation; which, as will be immediately seen, were adopted from the laws of the Romans. According to the codes last alluded to, the freedman, in whatever way he was manumitted, was bound, independently of all stipulations, to pay particular reverence to his patron; if he injured him, behaved to him in a haughty manner, or accused him of any crime, the patron

[1] Vide Form. ed. Lind. 25. p. 142. et seq. has noticed many of these duties and services.

[2] V. *ante*, p. 315. Mr. Turner, Anglo-Sax. vol. iv.

might recall his liberty [1]. The freedman was bound to remain with his patron during his life [2], or to pay a settled sum for liberty to depart [3]. No descendant of the freedman could intermarry with any member of the family of the manumittor [4]. If the freedman died without leaving any issue, all gifts which had been made by the patron to his freedman reverted back to the patron, or his heirs [5], unless they had been legally disposed of by the freedman in his lifetime [6]. One half of the property which the freedman had acquired from the land of his patron belonged, at his death, to the patron, or his heirs [7]; the remainder he might dispose of by will: but if a freedman died intestate, and without leaving issue, the whole of his succession went to the patron [8]. A freedman generally could not sell his land, or manumit a slave, without the licence of his patron [9]. Manumittors amongst the Francs, Burgundians, and Anglo-Saxons, had similar rights in regard to the pro-

[1] Vis. v. 7. leg. 9. 10. and 17. Edict. Theod. c. 48. Et vi. Long. ii. 34. 1.

[2] Vis. v. 7. l. 13. Long. ii. 34. 9.

[3] According to the law of the Burgundians, tit. 57. 12 solidi.

[4] Leg. Vis. v. 7. 17.

[5] Vis. v. 7. 13.

[6] Long. i. 14. 17.

[7] Vis. ubi sup.

[8] This was the law amongst the Lombards; but amongst the Visigoths the relations of the freedman might take all such property as the freedman had acquired, otherwise than by gift from his patron. Vis. v. 7. 14.

[9] Long. ii. 32. 4.

perty of their freedmen, independently of the stipulations contained in the charters of manumission [1].

Among the Goths freedmen were bound to follow their patrons to battle; those who were manumitted by the king, and their posterity, were bound to serve under the officer specially appointed by the king to lead them to battle [2]. Amongst the Bavarians, if a freedman were murdered, the patron was entitled to his weregild, or value [3]. Amongst the Lombards, every freedman was considered to be so completely under the controul of his patron, that the law called on the patron to exculpate his freedman from all offences laid to his charge [4].

I proceed to give an account of the relation of patron and vassal, which was intimately connected with, indeed in a great measure took its rise from, that of patron and freedman.

[1] V. int. alia, Leg. Burg. tit. 57. Rip. tit. 58. 61. and 62. and the Form. of Marculphus, 25. Leg. Withred. Wilk. p. 11.

[2] Vis. v. 7. 10.

[3] Bavar. tit. 4. § 11.

[4] Long. ii. 44. 1.

CHAPTER IX.

PATRON AND VASSAL[1] OR CLIENT.

THE Barbarians, bred up in arms, and accustomed to continual war, continued long after their settlement to hold it as utterly unworthy of them to engage in any but martial exercises[2]. The arts and lucrative employments were known to and exercised by the Romans, freedmen, and slaves alone. When, therefore, a free Barbarian, by incurring the payment of a heavy composition, or in any other manner was deprived of his property, he became, if no opportunity for plunder presented itself, reduced to absolute want. Hence freemen were sometimes reduced to such extremities as to be obliged to dispose of their liberty[3]. But an institution grew into use which

[1] Buccellarius. Vis. v. tit. 3. Greg. Turon. lib. ii. c. 8.

[2] "Pigrum quinimmo et iners videtur sudore acquirere, quod possis sanguine parare." Tac. de Mor. Germ. c. 14.

[3] V. *ante*, p. 329. The condition of the obærati amongst the Romans was in some respects similar. V. Sueton. Jul. Cæsar, c. 27. and Tacitus.

prevented the necessity of any freeman making so degrading a sacrifice. The securing a powerful train of dependants was, in those days, of the utmost importance. The nobles, therefore, and proprietors of extensive domains, were at all times ready to commit to any freeman who was willing to accept the terms, a portion of land, provided with slaves sufficient to afford him a subsistence, on condition that such freeman would place himself in a state of dependence similar to that in which a freedman stood in regard to his patron, and perform such services for his benefactor as a freeman could with propriety perform. Hence arose amongst the Barbarians, as it had amongst the Romans in the provinces, the relation of patron and vassal [1]. This institution [2],

[1] This institution was clearly of Roman rather than Barbarian original. V. ante, p. 59. "The Germans," says Tacitus, "neither expect any degree of gratitude for gifts bestowed, nor do they entertain any gratitude on account of those received." Tac. de Mor. Germ. c. 21. The Romans, on the other hand, considered that he who received a gift from another was *bound* to be grateful to him: "Etiamsi planissimæ sint donationes, si tamen *ingrati* existant homines in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam præstitimus certis ex causis eas revocare." Inst. Just. ii. 7, § 2. Cod. Just. viii. 56, 10. "Romani," Heineccius observes, "permulta largiebantur, sed patronis et clientibus non ut liberales essent, sed ut imputarent illa munera," &c. Heinnec. Elem. Jur. Germ. lib. i. § 79.

[2] See generally as to this institution, Leg. Vis. lib. v. tit. 3. throughout. Ibid. lib. vi. t. 4. l. 2. Ibid. lib. ix. 2. 9.

in a short time after its adoption, rapidly extended itself, and the grant of the usufruct of portions of land, or *mansi*, with a view to secure a train of dependants or vassals, became common, not only with the kings, as has been already noticed, who secured to themselves in this manner a powerful body of dependants, but also with the nobles and other extensive landed proprietors. Such grants, like the royal benefices, would at first be revocable at the pleasure of the grantor: at length, however, they were permitted to descend to the children or nearest relations of the vassal, on condition of paying, particularly amongst the Anglo-Saxons, a certain sum of money, a war-horse, a suit of mail, or the like, by way of heriot, or relief, to the lord [1]; and the duties which the vassal and his heirs were to render in consideration

Heriots or reliefs.

Bavar. tit. 3. c. 13. Rip. tit. 3. and tit. 73. § 4. Longob. ii. 15. 3. Ibid. iii. 9. 1. Cap. ed. Lindenb. lib. iii. As to the same institution amongst the Anglo-Saxons, vide ante, p. 315. and Leg. Inæ, § 39. Leg. Cnut. § 68. Bromt. p. 929. All the laws of the Visigothic Code, which treat of *patron* and *vassal*, are stated to be *antiquæ*, that is, compiled at least before the time of Chintaswind, who reigned circ. A. D. 642—8. Dufresnoy. It is only in this code that the early regulations that existed in regard to vassalage are detailed.

[1] The following appears to me to show that, in the time of Canute, the benefices of subjects had become hereditary: "Et si quis intestatus ex hac vita decedat—tunc non assumat sibi dominus (*hlaford*) plus possessionis ipsius quam justum armamentum; sed post mortem possessio ejus distribuatur uxori et liberis et propinquis cognatis," &c. Leg. Cnut. § 68. Brom. p. 929.

of such grant, were settled by custom or by law. The grand obligation which the vassal incurred by the acceptance of such a grant, was that of gratitude and fidelity[1]. The vassal was bound to assist his patron in the discharge of his duties, military and civil, and generally to obey his commands[2]; and as flowing from this general obligation, he was bound to serve about the person of his patron in war[3]. The patron, on the other hand, was bound to protect and defend his vassal; and if evicted from the property committed to him, the patron was bound to make up the loss by a gift of equivalent lands[4]. Originally the vassal was at liberty at any time to withdraw himself from vassalage[5], on restoring to

[1] See Cap. Pipen. Reg. Apud Vern. Palat. A. D. 752. § 9. The Anglo-Saxon vassal promised, "never in will, or weald, in word, or work, to do that which his lord loathed." See Leg. Edm. c. 1. Bromt. p. 859. Lingard, i. p. 458.

[2] For which reason, if a vassal committed a crime in company with, or by the command of his patron, the patron alone was punished. Vis. vi. 4. 2. Ibid. viii. 1. 1. Leg. Rip. 31. § 1.

[3] See Cap. ed. Lind. lib. iii. c. 82. from which it appears that the king's vassals, whether antrustions or not, were under his particular command.

[4] The description of the relative duties of lord and vassal given by Bracton, is applicable to its first institution: "Est tanta et talis connexio per homagium inter dominum et tenentem, quod tantum debet dominus tenenti quantum tenens domino, præter solam reverentiam." Bracton, 78 b. Glanville, ix. c. 4. Co. Litt. 100 b.

[5] "Quoniam ingenuo homini non potest prohiberi quia in sua potestate consistit." Leg. Vis. The law, however, in this respect was

the patron or his heirs every thing committed by them, together with one half of the property he had acquired while under patronage. The descendants, "filii et nepotes," or other relations of the vassal, who were permitted to enjoy the property which the ancestor held in vassalage at the time of his death, were bound also to perform the duties of vassalage so long as they were exacted by the patron and his heirs; and the right of withdrawing from vassalage, which, on the first introduction of this institution, the descendants equally possessed, was attended with the same conditions as those which were imposed on the ancestor. In default of males, females might succeed to the land thus committed. When the land descended to a female[1], the patron might marry the female to a man of equal rank with herself; when so married, she was entitled to retain all the lands which had descended to her; but she forfeited the whole if she, of her own accord, married a person of inferior condition. The patron also would probably be the legal guardian of his vassal, being a minor, and would enjoy in that respect all the rights of a parent. If a vassal were killed, the patron was

afterwards altered, as will presently be mentioned.

[1] If the girl were under the patronage of the king, she was said to be in verbo regis. Leg. Sal. tit. 14. c. 5. Leg. Rip. tit. 3. a mode of expression which was in use amongst the Romans. See Novell. Just. xvii. c. 6. See also Greg. Turon. lib. ix. c. 19.

entitled to receive his weregild, or legal composition, from the murderer.

The advantages which were found to arise from the protection afforded to the vassal by a powerful patron, caused at length all persons of moderate property to look for a protector or patron from amongst the nobles and most powerful men of the kingdom. So feeble were the powers of justice, that men who depended on their own individual exertions, and the protection which they could obtain from the laws, found themselves unable to preserve their property from the outrages of the plundering bands by which the country in those times was universally infested [1]. Persons, therefore, of moderate property, sought the protection they required, by soliciting some one, powerful already from the number of his vassals and dependants, to allow them to inroll themselves amongst his vassals, and to commend themselves and their property to him as their protector and lord. In the time of Charlemagne there was scarcely a person in his widely extended empire who was not the vassal either of the monarch, of some bishop or count, or other powerful individual [2]. There are numerous

[1] Vide Leg. Long. i. 17. 4. 5. Burgund. tit. 29. § 3.; Greg. Turon. sparsim, and the formularies cited below.

[2] Vide Capit. Car. Mag. Ann. 806. § 7. Cap. ad Aq. Palat. Ann. 807. § 2. Capit. Bononiæ, A. D. 812. § 9. By the Capit. of Ludov. Pius, A. D. 815. Bal. to. i. p. 552.

passages in the Anglo-Saxon annals and laws, which show that in England also, even before the time of Edward the Confessor, every person was dependent on some lord, (hlaford) or patron[1]. The person who thus commended himself[2], became, whilst under protection, in all respects, the vassal of his patron or lord[3]. Nor was it the weak and timorous alone who solicited to become the vassals of the powerful chieftains; a fierce barbarian, who singly feared to give full scope to his ferocity, would often endeavour, by becoming a vassal, to procure protection against the revenge or punishment he was likely to incur: and accordingly it was found necessary amongst the Lombards, to denounce the heaviest penalties against the judge who, out of respect or dread of the patron of an offender, hesitated to pronounce the sentence of the law[4].

It appears that it became the common practice for those who had liberty of choice to commend themselves to the patronage of some count, whose dignities, as before mentioned, had then become hereditary.

[1] Leg. Inæ, § 3. § 39. and 51. Leg. Ethelb. § 8. and 15. Leg. Cnut. § 68. ap. Bromt. Leg. Edovard. § 35. "Quoniam volo ut quilibet eorum qui innocens est serviat cui-cumque velit domino." Leg. Æthelst. Wilk. p. 62.

[2] "Commendo" is explained as here used. Leg. Vis. v. 3. 1.

[3] Vide Form. edit. Lind. 92. et seq.; ibid. 37. et seq.

[4] Leg. Longob. l. 18. 2. a law of Ratchis. Justinian had been compelled to make a similar law. Novell. xvii. c. 13. See also on this subject, Greg. Turon. iv. c. 41. as to Andarchius, "et se patrocinio Lussi ducis commendavit," &c.

Some persons sought the protection they required, by becoming the vassals of ecclesiastics, who, in addition to the temporal powers they possessed, could call in the powerful aid of spiritual censures[1]. Even those persons who themselves had a train of vassals, were prompted to seek higher protection. The advantages which attended the being ranked as a royal vassal, were so great, that it was an object of ambition to the most powerful individuals. If the person applying to be admitted to this honour, was approved by the king, he was, as before has been observed, accepted as a royal vassal, and, where his property was sufficiently large, was also admitted to the rank of an antrustion[2]; sometimes, however, the person so offering himself, was placed, with his whole train of dependants or subvassals, under the patronage of a powerful antrustion[3]. In England the inferior thanes did not consider it any degradation to commend themselves as vassals to a bishop, eorl, or thane of higher degree[4].

The sovereigns of the Franks, down to the time of Charles the Bald, claimed the prerogative of being first consulted by the person who sought to

[1] Form. ed. Lindenb. 92. Greg. Turon. lib. iv. c. 47. lib. v. c. 49.

[2] V. *ante* of the Royal Antrustions, et v. Form. edit. Lindenb. 47. Marculph. form. f. 18.

[3] Formul. edit. Lindenb. 38.; and see the charter of Henry I. in the appendix to Lye's Saxon Dict. "Et super tam multos, thanorum quos ego eis concessi," &c.

[4] Heywood, p. 208.

commend himself to the patronage of another, lest the patron chosen should be an enemy to the king. A perfect liberty of choice was allowed by Charles the Bald, provided the patron were a subject of his empire [1]. It has been observed, that originally the vassal might, at any time, withdraw himself from vassalage; however Pepin I., and then Charlemagne, ordained that no one should have this liberty after he had accepted from his lord to the amount in value of one solidus, unless the lord were guilty towards his vassal of some offence, which amounted to a dissolution of the original compact between them [2]. By the laws of Ina, also, the vassal was prohibited from leaving his lord without leave [3]; but this prohibition, as I conceive, related only to such vassals as had received any thing by way of benefice from their

[1] "Volumus etiam ut unusquisque liber homo in nostro regno seniorem qualem voluerit in nobis aut nostris fidelibus accipiat." Capit. Ann. 847. § 2. Baluze, to. ii. p. 44. By a capitulary of Charlemagne, ad ann. 806. Baluze, to. i. 440. it was provided, that on the division of his empire, every one should be at liberty to commend himself, after the death of his present lord, to any person he chose in any of the three kingdoms. Under Athelstan also, full liberty of choosing their lords was open to all Anglo-Saxon freemen. [Wilkins, p. 62.

[2] Cap. Reg. Pepin. A. D. 783. § 5. Cap. Car. Mag. A. D. 813. § 16. "Excepto si eum vult occidere, vel uxorem aut filiam maculare seu hereditatem eo tollere;" and see the Capit. of Charles the Bald, A. D. 847. § 3. to the same effect.

[3] Leg. Inæ, § 39.

patron, and not to those who had voluntarily commended themselves and their lands, as there are repeated notices in Domesday of persons who were at liberty to leave their present lords, and place themselves under the patronage of whomsoever they might choose.

The lord who accepted a free man as his vassal, was bound to see that the military service which the vassal was liable to as a freeman, was duly performed. And when in latter times the military services required of the possessors of land was determined by the number of mansi possessed by each individual, vassals were directed to serve either with the count or with the lord, for the lands which they had received or held in vassalage [1]. The lord, in virtue of the compact of vassalage, naturally exacted the attendance of his vassals; consequently the armies of freemen, which in ancient times had been brought into the field, under the command of the count, in the continental nations, insensibly vanished; and the king could only call an army into the field through the medium of the royal vassals. In England, however, though the same custom

[1] "Ut omnis liber homo qui quatuor mansos vestitos, de proprio suo, sive de alicujus beneficio, habet, et ipse se preparet, et ipse in hostem pergat, sive cum *seniore* suo," &c. Capit. ed. Baluze, tom. i. p. 490. Ann. 812. § 1. which capitulary extends the provisions of the Capit. ad Aq. Palat. A. D. 807. § 2.

prevailed in this respect as in the continental nations [1], the king always retained the right of exacting the oath of fealty from every freeman, whosesoever vassal he might be [2]; so that no one, even at the command of his immediate lord, could turn his arms against the king, without a breach of his oath. This regulation preserved the kingdom from much of the feudal anarchy to which the liberties of the continental nations ultimately fell a sacrifice.

[1] The form of summons appears in the writ directed to Will. de Bello Campo de Aumel. Rot. Claus. 45 Hen. III. Append. to the Lord's Reports, p. 84.

[2] V. Leg. Edmund. cap. 1. ap. Bromt. p. 859. Ann. Waverlens, A. D. 1084 and 1086, &c. et V. Leg. Hen. I. Wilk. p. 256. b.

CHAPTER X.

MUTUAL BORH OR PLEDGE AMONGST THE ANGLO-SAXONS.

Mutual borh or pledge.

ALFRED, in imitation possibly of the similar institution which Childebert introduced in his empire[1], endeavoured, for the better preservation of the public peace[2], to improve the institutions of Edgar and Ethelred[3] in regard to each freeman of the inferior orders in society, whether resident within towns or in the country, being under the borh or pledge of his neighbours. To effect this he made a regular division of all the counties in his dominions into hundreds, or wapentaks and

[1] V. *ante*, p. 306. in notis.

[2] Ingulphus, 870.

[3] The law of Edgar is in these terms; Wilk. p. 78. "Every man shall find and have borh, and the borh shall produce him to every legal charge, and shall keep him; and if he have done any wrong and escapes, his borh shall bear what he ought to have borne," &c.; and again, "I will that every man be under borh, both in burghs and out of them; and when this has not been done, let it be settled in every borough and in every hundred." Ibid. p. 80. 102. or Brom. p. 872. 894.

tithings, and directed that to each hundred and tithing, which, according to the better opinion, appears to have consisted of ten families, a distinct *præpositus* or *greve*[1], should be appointed.

According to the institutions of Alfred, which were continued by his successors[2], all the members of a tithing were pledges for the appearance of each other, to answer all criminal charges that might be brought against them. In populous towns this system of mutual pledge was effected by making every one associate himself with a certain number of his fellows in a society or gild-scipe, the members of which became answerable for his conduct; but in return they were allowed to claim a portion of his *were*, if he were killed[3]. The lords of such persons as were in a servile state, were sureties for their conduct. The person who had no borh might be killed with impunity[4]. In Bracton's chapter *de Corona*, may be seen the improved system of general police, which was built on the foundation of Alfred's institutions.

[1] Hoveden, p. 607. &c.

[2] Int. alia, v. Leg. Canut. § 40.; Brom. 924.

[3] Wilkins, Leg. Anglo-Sax. p. 18, ib. p. 41. a law of Alfred.

[4] Wilkins, p. 102-3, ib. p. 112. Bracton, 116. a. et seq. 124. b. et seq.

CHAPTER XI.

CLAN.

Clan.

THE family connexion still familiar to us, under the name of *Clan*[1], may be discovered in the early customs of the Germans[2], and appears in the codes under the denomination of *parentelâ* and *genealogia*[3]. So strong was the connexion, that the laws of the Visigoths prohibited a man from giving evidence against a third person, in a cause in which any one of his kindred within the degree of cousin was engaged, unless both sides were of the same clan, or it was impossible to procure any other evidence from freemen[4]. Be-

[1] This family connexion existed in great force amongst the Romans in every period of their history. V. int. alia de Fabia Gente, Liv. Hist. ii. 48.; and de Gentili Copiâ Vitelliorum. Sueton. Vitell. c. 1.

[2] "Suscipere tam inimicitias seu patris seu propinqui quam amicitias necesse est." "Non fortuita conglobatio turmam facit, sed familiæ et propinquitates." Tac. de Mor. Germ. c. 7. c. 21.

[3] Sal. tit. 63. Burg. 83. § 1. Long. ii. 14. l. 1. Bavar. tit. 2. § 20. Alam. tit. 84.

[4] Vis. ii. 4. l. 12. This law is placed amongst the capitularies, by Benedict. Cap. ed. Lindenb. lib. vi. § 271.

sides the natural connection of blood, kindred were held together by the institutions of the Barbarians. All within certain degrees were interested in the nuptial price of the females of their family, or had a voice as to giving them away in marriage [1]. To the male relations it belonged to avenge the death of their kinsman, and they received the legal composition due from the offender. By the Salic law, one half of the composition paid for the murder of a father went to the sons, the other half to his male relations, in both lines, in equal proportions; either line failing, its share went to the crown. Amongst the Anglo-Saxons, the father, sons, and brothers, took the *healsfang* or price of liberation of the murderer of a son [2]. On the other hand, amongst the Francs and the Anglo-Saxons, the family were originally compelled to pay the penalties incurred by their kinsman, if he were himself incapable of doing so. Amongst the Francs, however, in the time of Childebert, it was ordained that no one of the relations should assist a murderer in redeeming his life; and in England, from the time of Edmund, the kindred

[1] V. Leg. Sax. tit. vii. § 3. and *ante*; and see on this subject Cod. Just. v. 4. l. 1. and The Code Napoleon, Art. 407. of the *Family Council.*

[2] Bavar. tit. 3. § 11. 13. and Fris. tit. i. l. 1. Thuring. tit. 6. § 5. Long. i. 9. l. 18. Leg. Sal. tit. 65. § 1. and 2. Wilkins, Leg. Anglo-Sax. p. 43. 44. and 110.; and see Lingard's England, 4to. vol. i. p. 369-70.

of the murderer were protected by the laws from the vengeance of the family of the deceased, and were prohibited under severe penalties from affording to the murderer any aid or protection[1]. A man might renounce his clan, by appearing at the county court, and going through various solemnities; after which, as he became released from all the burthens of affinity, so he was deprived of all its advantages; and his composition, if he were killed, belonged to the king[2]. I proceed to the relation of husband and wife.

[1] As to the law of the Anglo-Saxons, see Francs, V. Leg. Sal. tit. 61. Wilkins, p. 3. and p. 73-4. Decret. Childebert, § 5. As

[2] Sal. tit. 63.

CHAPTER XII.

HUSBAND AND WIFE.

THERE were several formalities necessary to be complied with, in order to complete a proper and valid marriage [1]. The parties must be of full age. Amongst the Lombards, females were of full age at twelve [2]; fourteen was generally declared to be full age for males [3]. Free must contract with free [4]. By the Ripuarian and Frison laws, a freeman who married a slave lost his liberty, but a Lombard was at liberty to marry his slave, Husband and wife.

[1] "Severa illic matrimonia." Tac. de Mor. Germ. c. 18.

[2] Long. ii. 1. l. 10.

[3] These ages were adopted from the Romans. See Dig. xxiii. 2. 4. and Heinnec. El. Jur. Germ. lib. i. § 197. Eighteen and twenty were the usual times fixed for the full age of males in the northern nations, who did not adopt the Roman customs. Wilkins. Anglo-Saxon laws, p. 75. note (*e*). "Sera juvenum Venus." Tac. de Mor. Germ. c. 20.

[4] Sal. tit. 14. § 15. Vis. iii. 2. 3. Alam. tit. 18. § 1. Amongst the Alemans, if a free woman married a colonus regis aut ecclesiæ, though such a man was *free*, yet she could not inherit the land of her father, "quia sibi *coæquali* non nupsit." Alam. tit. 57, et v. Long. ii. 1. 11.

first making her free [1]. If a free woman married a slave, so foul was the stain that was cast on the family, that her nearest relations might kill her, or sell her out of the province as a slave [2]. The parties must not be related within certain degrees [3]. A widow could not properly marry until one year had elapsed since the death of the former husband [4]. Originally marriage was forbidden between a Barbarian and a Roman; latterly, however, they might intermarry, unless prohibited by the count [5].

Espousals. The first part of the ceremony of marriage, amongst all the Barbarians, was *espousals*. Custom, or the laws, appointed to every woman a guardian, without whose consent she could not be obtained in marriage; and accordingly the bridegroom had to enter into a bargain with such guardian to obtain his bride [6]. Amongst the Anglo-Saxons, though marriage was treated as a purchase of the female

[1] Which was consonant to Cod. Just. v. 4. 15. The Mosaic law may have had some influence. See Deuteronomy, xxi. 13. Levit. xix. 20.

[2] Long. ii. 9. 2.

[3] Within the sixth degree, Vis. iii. 5. 1. By the Salic law, a man was prohibited to marry "sororis aut fratris filiam aut alterius gradus consobrinam, fratris uxorem aut avunculi." Sal. 14. § 16. The prohibitions in the codes, as Heinneccius observes, were taken more from the canons than the ancient German customs. See Heinnec. Elem. Jur. German. lib. i. § 205. et seq.

[4] Vis. iii. 1. 1.; et V. Novell. xxii. c. 40.

[5] Vis. iii. 1. 1. Heinnec. Elem. Jur. German. lib. i. § 198. 199.

[6] Rip. tit. 74. Alam. tit. 54. § 1. 2. Vis. iii. 2. 8. Long. ii. 2. 2. Leg. Eadmundi, Wil-

from her legal guardians, she could not be married against her consent [1]. The barbarian codes, in some cases, allowed the female to act for herself, as when the guardian denied his consent from improper motives. The guardian of the female, before marriage, was usually the father; if he were dead, the brothers, or other relations in the nearest degree on the father's side. In some nations, all the near relations were called in to advise with the legal guardian, as to the acceptance of the suitor [2]. The contract of espousals was made and completed with the guardian, by the intended husband paying, or agreeing to pay to the guardian, as the nuptial price of the female, a certain sum in money, or in valuables, for the benefit of the guardian, or of him and such other of the relations of the female as were by law entitled to receive it [3]. A ring [4] was frequently

kins, p. 75. The custom of purchasing wives also prevailed amongst the ancient Suiones; Wilkins, p. 75. note (*e*), the Armenian's; Novell. Justin. xxi. and American Indians, Robertson's America.

[1] Wilkins, ubi sup. Leg. Edmund. ap. Bromt. p. 862. Et V. Dig. xxiii. 2. 2.

[2] Sax. tit. 7. § 3. Alam. tit. 54. Rip. 35. § 3. Fris. tit. 9. § 4. Long. ii. 21. 11.: so amongst the Romans; Inst. Just. i. tit. 10. pr. Cod. Just. v. 4. 2. amongst whom, in case of difference, a judge was called in to decide. Ibid. l. 1.

[3] Amongst the Burgundians, the wife might require that one *third* should be laid out in the purchase of ornaments for her. Burg. 86. § 3.

[4] This was a Jewish as well as a Roman custom. See Uxor Ebraica, lib. ii. c. 14. Fleury, Mœurs des Chretiens, p. 228. and tit. Espousals, in

given, *arrharum nomine* [1], in earnest of the bargain [2]. The amount of the nuptial price was sometimes fixed by law, but more commonly depended on the agreement made between the contracting parties [3]. The widow was, as to marriage, still under the power of a guardian [4]; but on her second marriage, the heirs of the deceased husband were in some nations entitled to share the nuptial price with the relations of the female [5]. Among the Burgundians, a woman who married a third time might herself keep whatever she could obtain, as the nuptial price [6].

[1] The nuptial price itself was sometimes called arrha. Greg. Turon. lib. iv. c. 47. Selden uses the term in the same sense. Ux. Ebra. lib. ii. c. 2.

[2] Vis. iii. 1. 3. Edict. Theod. 93. Thuring. tit. 10. § 2. Fris. et Alam. ubi sup. Long. ii. 2. 1. Sax. tit. 17. § 6. Leg. Anglo-Sax. Wilkins, p. 75.—"Intersunt parentes et propinqui et munera probant—in hæc munera uxor accipitur." Tac. de Mor. Germ. c. 18.

[3] By the law of the Saxons it was fixed at three hundred solidi, both for a virgin and a widow. Sax. tit. 6. and 7. which amounted, of course, to a prohibition of marriage in respect of vast numbers. By the Salic law, the man who espoused a woman, was only *bound* to give one solidus and one denarius to her guardian, if she were a virgin. Form. edit. Lind. 75. "Legati offerentes solidum et denarium, ut mos erat Francorum, eam partibus Clodovæi sponsant," &c.—three solidi and one denarius, if she were a widow. Sal. tit. 46. § 1. The Barbarians may have adopted some of their regulations on this subject from the Mosaic law, see Deuteronomy, chap. xxii. 29.

[4] Leg. Sal. et Sax. ubi sup.

[5] Long. ii. 1. 4. and 5. Burg. tit. 69. § 1.

[6] Burg. ubi sup.

The severest penalties were pronounced against either husband or wife, who married without having properly completed the ceremony of espousals[1]; but if a girl had fallen into the hands of a brother, who, from undue motives, delayed to give her in marriage, she might find a husband for herself[2]. The woman who married one man, after having been espoused to another, became among the Visigoths the slave of her lawful spouse[3]; and the man who married a woman espoused to another, forfeited his liberty to the lawful spouse[4]. In other nations, such a man was compelled to pay a heavy composition to the relations and to the spouse, besides a fine to the king[5]. Amongst the Lombards, the man was bound to marry the woman to whom he was espoused, within two years; at the end of that time he forfeited the nuptial price, or such other penalties as were stipulated in the contract of espousals, and the woman might again be espoused[6]: but a man

[1] Rip. tit. 35. § 3. Long. ii. 2. 1. 1. Fris. 9. § 4. Thuring. tit. 10. § 2. Sax. tit. 6. Vis. iii. 2. 8. Alam. tit. 54. § 2. 3.

[2] Vis. iii. 1. 8.

[3] Vis. iii. 1. 2.

[4] Vis. ubi sup. Amongst the Bavarians, he was bound to restore her, and pay one hundred and sixty solidi as a composition. Bavar. tit. 7. § 16.

[5] Sal. tit. 14. § 8. 9. Long. ii. 2. 1.

[6] Long. ii. 1. 1. By the Roman imperial law, the spouse was obliged to wait three years, and then she might enter into a new contract, "ne opportunum nubendi tempus amittat." Cod. Just. v. 17. 2.

was excised from marrying a spouse who had become afflicted with leprosy, madness, blindness in both eyes, or in case she were convicted of incontinence [1]. For a man to desert the woman he had espoused, and marry another, was an insult to the whole family, and such an offender was compelled to pay a composition to the relations; besides which, in order that the value of the girl might not be diminished by such desertion, the law of the Bavarians required, that, besides paying the fine, the man should swear with twelve of his kindred, that he had deserted the girl solely from the love he bore to the woman he had married, and not from any fault in the girl or from enmity to the relations [2]. If he refused to take such oath, he became the object of a deadly feud with all the relations of the girl.

Constitution of dower.

In most of the Barbarian nations, after the nuptial price was paid, the intended husband was bound to bestow on or secure to his wife a certain portion of property by way of dower [3].

[1] Long. ii. l. 2. 3.

[2] Bavar. tit. 7. § 15. Radigis, chief of the Werini, about A. D. 540, espoused an East-Anglian princess, but afterwards married a sister of Theodebert, king of the Francs. The whole East-Anglian nation rose in arms to avenge the insult; nor could it be forgiven till Radigis had repudiated his wife, and married his lawful spouse. Procop. Hist. Goth. Turner's Anglo-Saxons, vol. i. p. 272.

[3] The *dos*, or *dower*, of the Germans, as observed by Tacitus, differed from the *dos*, or *dowry*, of the Romans in

The amount of the dower, when there was no contract, was fixed in some nations at a certain sum [1]. It varied in others according to the genealogy or rank of the female [2]; but it was most commonly regulated by a contract in writing made at the time of espousals [3]. The wife in general became entitled to the enjoyment of her dower from the time of the marriage. By the early laws the wife had absolute dominion over it [4]; lat-

this, that it was given by the husband to the wife, not by the wife to the husband. Tac. de Mor. Germ. c. 18.

[1] Fifty solidi. Rip. tit. 37. § 2. By the law of the Alemans it was fixed at 40 solidi; and it would rather seem that it could not be increased or diminished by any act of the parties. Simil. Bavar. tit. 14. c. 7. § 2. This regulation would of course be a very effectual check to improvident marriages, but could only apply to those in the higher orders of society.

[2] Bavar. ubi sup. Vis. iii. 1. 5. and 9.

[3] Rip. tit. 37. § 1. Form. edit. Lind. 75. which is a libellum dotis, conferring land, slaves, and farming stock, to be enjoyed after the conclusion of the marriage, by the wife in full property. See also Formul. 76. and the three following. Formul. 79. is a *constitutio dotis*, by which a man gives to his spouse in dower, secundum legem Salicam, various mansi, and parts of mansi, with the stock upon them, to be enjoyed by her after the marriage in full property. Formul. 80. is to the same effect. The law of the Visigoths would not permit the sum stipulated to amount to above a certain proportion of the property of the intended husband. The law of the Lombards also restricted the amount.

[4] See the references in the preceding notes; and Alam. tit. 55. Justinian, by Novell. 97. c. 1. and 127. c. 3. restricted the right which the widow had enjoyed by the old Roman law; and this has been followed in the Code Napoleon, Art. 1554, et seq.

terly, however, she was restricted in the disposal of it, by certain laws in favour of her children[1]. The wife who was put away by her husband for any other reason than for a crime which was a lawful cause of divorce, retained her dower: so did she if she obtained against him a divorce for lawful cause; but she lost it if she were lawfully put away[2]. The agreement regulated the consequences in this respect of divorce by mutual consent. Amongst the Anglo-Saxons, the property secured for the wife, which, in case she had children, and remained a widow, became her absolute property, was called the *morgen gift*[3].

Solemnization.

The espousals being completed, and the dower properly constituted or secured, the parties pro-

[1] A complaint is made in the code of the Visigoths, iv. 5. 2. and 5, that it was a custom with women to pass over their children in disposing of their dower; women were therefore restricted, where they had issue, from giving more than one-fourth to strangers. The law of the Burgundians preserved the whole for the children. Burg. tit. 62. § 2. The law varied in this respect in different parts of the Saxon territory. Sax. tit. 7.

[2] Edict. Theod. c. 54. Vis. iii. 6. 1. Amongst the Jews: "Divortio ejectæ dos comes erat excepto ubi uxoris contumacia, impudicitia, aut ejusmodi quid aliud in causa esset contrarii." Uxor Ebraica, lib. ii. c. 9. and 19. So by the Roman law, as settled by Justinian, the wife obtaining a divorce against her husband for lawful cause, obtained for herself her *dowry* and the *nuptial donation*; the husband, who procured a divorce, retained the *nuptial donation*, and obtained the *dowry*. Novell. Justin. xxii. c. 1. and 15.

[3] IV. Turner, 110-3.

ceeded to *solemnization*. This was performed with much pomp and parade. Some friends of the bridegroom, on whom this honour was conferred, with a select number of females, *paranymphi*, or *bridesmaids*, preceded by buffoons and musicians [1], and attended by multitudes of the relations and friends of both parties, walked in procession to the house of the female espoused. Here she was delivered into the hands of the bridemaids, and the procession returned to the house of the intended husband [2]. It having become a practice amongst the Lombards for men to collect together and throw dirt on the females who walked in the procession, a fine of 900 solidi was imposed on those who should be guilty of this offence. Jollity closed the evening. Most of these ceremonies will be immediately recognized as of Roman original [3]. Amongst the Francs, the bride, on the following morning, was entitled to claim from her husband

[1] A similar ceremony was observed in Jewish marriages. See Uxor Ebraica, lib. ii. c. 14. ad fin. "de Sponsarum coronis," &c. Ib. c. 15. "de paranymphis Ebræorum sponsi, amicis, filiis thalami nuptialis," c. 16. Amongst the Romans, the wife, if a maiden, was led home by a paranymphus, νυμφευτης; if a widow, by a *pronuba*. Godefroy's Notes on Cod. Just. v. 1. 1.

[2] See Vis. iii. 1. 3. of the festi celebritas. Long. i. 16. 8. Greg. Turon. lib. iv. c. 45.

[3] Heinnec. Elem. Jur. Germ. lib. i. § 212. and 218. Wilkins, Leg. Sax. p. 75. note (*e*). V. ante, p. 107. et seq.

a morning gift, *morgangeba*, which she received in addition to her dower [1].

How far marriage an ecclesiastical ceremony.

The question, whether at this early period marriage was an ecclesiastical ceremony, naturally presents itself in this place. Fleury, in his Mœurs des Chrétiens [2], states that from the earliest ages marriage was considered by the fathers of the Christian church as an ecclesiastical [3], as well as a civil ceremony. In favour of this assertion, he cites a letter from St. Ignatius (a disciple of St. John, and who was bishop of Antioch, A. D. circ. 68. the 2d, some say the 3d, from St. Peter), to St. Polycarp, in which is the following passage: "But it becomes all such as are married, whether man or woman, to come together with the consent of the bishop, that so their marriage may be according to godliness, and not in lust. Let *all things* be done to the honour of God [4]." And also the following passage from Tertullian [5]: "Unde sufficiam ad enarrandam felicitatem ejus matrimonii

[1] Rip. tit. 37. § 2. Alam. tit. 56. § 2. Long. ii. l. 4. Greg. Turon. lib. ix. c. 20.

[2] P. 228, et seq. See also his Hist. Ecclesiast. liv. iv. c. 38. and 39.

[3] It is to be remarked, that amongst the Romans it was part of the duty of the College of Priests to decide on the validity of marriages. Tac. Ann. i. c. 10.

[4] Polycarp. et Ignat. Epist. edit. Jacob. Usser. Archiepisc. Armachani. Oxon. 1644, p. 139. And see the bishop of Lincoln's Epistles of the Apostolic Fathers, Lond. 1710, p. 40.

[5] Ad uxor. lib. ii. p. 483-4.

quod *ecclesia conciliat*, et confirmat oblatio, et obsignatum angeli renunciant, pater rato habet. Nam nec in terris filii sine consensu patrum rite et jure nubent. Quale jugum fidelium duorum: unius speciei, unius voti, unius disciplinæ, &c.—non licet aliter fidelibus nubere, et si liceret non expediret." But these authorities do not appear to support the assertion of the able and candid writer above referred to. Godefroy, in his notes on the constitutions of the emperor Leo [1], states, on the authority of St. Ambrose [2], who wrote about the year 390, that it was ordained at the fourth council of Carthage, which was held A. D. circ. 252, that the married couple should be brought into the church to receive the benediction of the priest. Heinneccius [3] cites a letter to the same effect of Synesius, who was elected bishop of Ptolemais A. D. 410.

From the laws promulgated by Justinian, it would appear that in the Roman empire marriage was still considered to be merely a civil contract [4]; that the essence of marriage consisted in the mutual consent of the parties; and that, as the delivery of earnest, the instruments drawn up, and indeed all the formalities used on the occasion of

[1] Not. in Constitut. Leonis Imp. 89.

[2] Epist. 70. lib. ix.

[3] Elem. Jur. Germ. lib. i. § 211.

[4] Of the state of the law, in regard to marriage, before the time of Justinian, v. ante, p. 107, et seq.

a sale, were but evidence of the price being agreed on; so the dotal instruments, and other marriage formalities, were but evidence of the consent of the parties [1], and therefore might be spared when the marriage could be properly and as certainly proved in any other manner. The *illustrious, propter dignitatem,* were compelled to marry with dotal instruments; no other formality, civil or ecclesiastical, appears to have been necessary for the perfecting such a marriage, excepting perhaps the bringing home [2]. If persons of inferior rank perfected regular dotal instruments, the marriage was complete; Justinian directed, that where no such instruments were drawn up, the couple should go to a church, and there, in the presence of the defensor ecclesiæ, or officer who managed the temporal concerns of the church, and three clerks, at the least, declare themselves to be man and wife. He also ordained, in order that the requisite evidence might be preserved of such marriages, that an act of the marriage, stating the time and the mutual declaration, should be reduced into writing, and signed by the advocate of the church and the witnesses, which was usually deposited in the archives of the church;—the marriage was then complete. Farmers and others of low degree

[1] Novell. Justin. xviii. c. 4. § 1. Ib. xxii. c. 18. Et v. Cod. Just. v. 17. 11.; and Godefroy's notes on Dig. L. 17. 30.

[2] Novell. lxxiv. c. 4. § 1.

might express the requisite consent, without resorting to any of the above solemnities, in any manner, so that it could be proved [1]. Even if a man of higher degree promised, on the Evangelists, to marry a girl, and such promise could be proved by the girl, the couple were declared to be man and wife [2]. The emperor Leo VI. A. D. 886, appears to have been the first of the Roman legislators that declared ecclesiastical benediction to be *necessary* to marriage [3].

Among the Barbarians, the early codes mention nothing of ecclesiastical benediction in the celebration of marriage; and in the history of Gregory of Tours, marriage is treated as a civil ceremony [4]. The first mention of the interference of priests in the ceremony of marriage, to be met with in the laws of the Visigoths, which were confirmed at the various councils of Toledo, is, I believe, in a law of Chintaswind, who reigned A. D. 642—649 [5]. By this law it is declared, that in case two parties should be divorced for cause of adultery on the part of the wife, "si conversionis ad Dominum voluntas extiterit communem

[1] Novell. lxxiv. c. 4.

[2] Ibid. c. 5. And see Cod. Just. v. 4. 23. § 7.; and Godefroy's notes.

[3] See the beginning of his 89th Constitution.

[4] Int. alia, vide lib. iv. c. 41. of the marriage of Andarchius. "Præceptionem (Regis) ad *judicem loci* exhibuit ut puellam hanc suo matrimonio *sociaret*, dicens, quia dedi arrham in desponsatione ejus," &c.

[5] Lib. iii. 6. 2.

assensum viri scilicet et mulieris, *sacerdos evidenter agnoscat*, ut nulla postmodum cuilibet eorum ad conjugalem aliam copulam revertendi excusationem intercedat;" but, as there were many cases in which the priest had, among the Visigoths, concurrent jurisdiction with the civil judge, this law does not necessarily import that the interference of the priest was in his ecclesiastical character. In the time of Ervigius, who reigned A. D. 680—687, ecclesiastical benediction was declared by the Visigothic law to be absolutely necessary to marriage [1]. Shortly after this time, it was declared amongst the Francs, that all marriages should take place publicly; and in the time of Charles the Bald, marriage appears to have become, amongst the Francs, at least in the higher orders of society, an ecclesiastical ceremony [2]. The first mention of ecclesiastical benediction as essential to marriage in the laws of the Anglo-Saxons, is in those which were made in the reign of king Edmund, who reigned from the year 940 to 946 [3].

[1] Vis. xii. 3. 8.

[2] V. Capit. Carloman. Ann. 743. § 3. Capit. Pepin. Reg. A. D. 755. § 15. which directs, "ut omnes homines laici, tam nobiles quam ignobiles, publicas nuptias faciant." By Capit. Car. et Ludov. Imp. ed. Lind. lib. vii. § 361, it is directed that the woman "sacerdotaliter, *ut mos est*, cum precibus et oblationibus a sacerdote benedicatur," which I believe is the first positive ordinance inforcing ecclesiastical benediction.

[3] Wilkins, p. 76.

It appears, therefore, that amongst the Barbarians as well as the Romans in the early ages, it was not *essential* that the ministers of religion should be called in to complete the nuptial ceremony [1].

By marriage concluded in the manner above-described [2], the guardianship, *mundium*, of the wife, was transferred from the parents or relations to the husband [3], and the woman became subject to the law of her husband [4]. Marriage, however, amongst the Francs, was a species of partnership [5]. Mutual rights of husband and wife.

[1] See Uxor Ebraica, lib. ii. c. 26, 28, 29.

[2] Where a man married without constituting dower for his wife, he was said to be married *ad legem morganeticam*, which species of marriage is well explained by Heinneccius, El. Jur. Germ. lib. i. tit. 13. It is thus referred to in Form. 60. edit. Lindenbroc: "Cum non est incognitum quod feminam illam bene *ingenuam* ad conjugium mihi sociavi, sed talis causa vel tempora me oppresserunt ut chartulam libelli dotis ad eam sicut lex declarat minime excessit facere, unde ipsi filii mei secundum legem *naturales* appellantur."

[3] Amongst the Lombards, the power of the husband over his wife was very great: "Si maritus uxorem suam *occiderit immerentem* per quamlibet occasionem, quæ per legem non sit merita mori, componat," &c. Long. i. 9. 12. et v. ibid. ii. 55. 2. et Conf. Dig. xxiii. 3. 9, 3.

[4] Long. ii. tit. 7.

[5] "Mulier—ipsis incipientis matrimonii auspiciis admonetur venire se laborum periculorumque socium." Tac. de Mor. Germ. c. 18. Of the *Conjugalis Societas* amongst the Barbarians, see Heinnec. Elem. Jur. Germ. lib. i. § 261—272. "Chasquns se sait (says Beaumanoir, p. 110) que compagnie se fit par marriage: car si tost come marriage est fez li biens de l'un et de l'autre si sont quemun par le vertu dou marriage." It is remarkable that Henry the Sixth of

in which each had their separate rights. The wife might sue or be sued in her own name, though it was usual for her to give to her husband a mandate, authorizing him to conduct her affairs, but without such authority he could not interfere concerning them[1]; and by the law of the Visigoths, if a husband proceeded at law in the name of his wife without a mandate, no judgment given in the cause could bind the wife. In some nations, every thing which the husband and wife jointly acquired during marriage was divided between them or their representatives at its dissolution[2]. The Ripuarians gave the wife or her representatives one-third, the Saxons the half. The Alemans allowed the widow to retain, besides her dower, all gifts made to her by her own family, and whatsoever she had brought from her father's house[3]. Among the Bavarians, the widow, if

England, by letters dated the 26th of December 1441, conceded in favour of the citizens of Paris that the wife's share in the community should not, as theretofore, be subject to confiscations pronounced against the husband, a privilege which they continued to retain after the expulsion of the English. The expression *societé conjugale* is retained in the Code Napoleon, liv. iii. tit. 5. ch. 2. part 1. § 2. art. 1399, et seq.

[1] Andegav. Civitat. Form. 2. in Histor. Franc. tom. iv. 564. Vis. ii. 3. 6. All these regulations are Roman, and are continued with modifications in the Code Napol. art. 1984, et seq.

[2] Rip. tit. 37. Sax. tit. 8.

[3] Alam. tit. 65.

she continued unmarried, might retain all gifts made to her by her deceased husband [1].

Husband and wife, among the Visigoths, seem each to have retained the ownership of their whole property; but bringing the whole into *community*. If the husband and wife, of whatsoever condition, while living together, made any profits, or acquired any thing by purchase with their joint property, such profits and acquisitions were divided between the couple in proportion to their separate property; the husband and the wife being placed, in this respect, precisely on the same footing. As to those things which were conveyed to them by written instruments, their rights were determined by the terms of the instrument. But whatsoever the husband acquired by any public employment, or by gift from the king, his own individual friends, or from a patron, belonged to him alone, and descended to his heirs free from all claims of the wife. The husband, also, was solely entitled to all profits made by the joint slaves; for he alone was answerable for the harm they committed [2]. In default of kindred within certain degrees, the husband succeeded to the wife, and the wife to the husband [3].

The marriage state was considered most sacred; the intruder on its rights, the offending wife, and

[1] Bavar. tit. 9. § 3.

[2] Vis. iv. 2. 15 and 16.

[3] Seven degrees. Vis. iv. 2. 11. et v. Edict. Theod. c. 24.

accomplices, might be put to death by the husband in the heat of his rage, with impunity [1], or they might be claimed by him as slaves [2]; nor was the enticement of the wife any excuse for the adulterer [3]. The Lombards even permitted a slave to take immediate vengeance on a freeman. The female who was willingly a party to the infidelity of a husband was delivered as a slave to the wife [4], and the suspicion of this detested crime authorised the liberal application of torture to the slaves who were supposed to have any knowledge of its commission [5].

Divorce.

Divorce was unknown amongst the ancient Germans, excepting for cause of adultery [6], a vice by no means prevalent; and second marriage on the part of the woman was not in general practice, even when the bonds of matrimony had been dissolved by the death of the husband [7]. Divorce is

[1] "Paucissima in tam numerosa gente adulteria, quorum pœna præsens et maritis permissa." Tac. de Mor. Germ. c. 18. 19. Burg. tit. 68. § 1. Long. i. 32. 2. and 3. Bavar. tit. 7. c. 1. § 1. Vis. iii. 4. § 4. Edict. Theod. c. 38. § 39. Fris. tit. 5. § 1. Greg. Turon. lib. viii. c. 19. and see Novell. Justin. 117. c. 15.

[2] Vis. iii. 4. leg. 1. 2. and 3.

[3] Long. et Vis. ubi sup.

[4] Vis. iii. 4. 9.

[5] Ibid. leg. 10. and 11.

[6] "Expellit domo maritus," &c. Tac. de Mor. ubi sup.

[7] "Melius quidem eæ civitates in quibus tantum virgines nubunt—sic unum accipiunt maritum quo modo

not mentioned in the laws of the Ripuarians or Salians [1]; but the practice very generally obtained after the Barbarians had settled among the Romans. In the preceding part of this work, I have mentioned the laws in regard to divorce which prevailed in the provinces at the time of the irruption of the Barbarians [2]. In the time of Justinian, great latitude in regard to divorce was still permitted in the Roman empire [3]. There were two modes of divorce then in use, one *by mutual consent*, the other for *cause defined* [4]. Justinian prohibited parties from divorcing one another excepting for cause defined [5]; but his successor Justin found it necessary to repeal the prohibitions of Justinian, and to authorise, according to the an-

unum corpus unamque vitam." Tac. de Mor. Germ. Procopius, speaking of the Germans, says, "Tanto enim honore pudicitia apud barbaros colitur, ut femina de cujus nuptiis actum est, etiamsi corpore sit integra, pro corrupta habeatur;" which would rather show that the reason why widows did not marry was because they could not obtain husbands.

[1] "Si quis uxorem alienam tulerit, *vivo marito*, 200 sol. mulctetur." Rip. tit. 35.

[2] V. *ante*, p. 112.

[3] Gibbon, vol. viii. p. 61—66. et v. Uxor Ebraica, lib. iii. c. 28.

[4] Novell. 22. c. 4. The legal causes for divorce are enumerated, ibid. c. 15. The causes of divorce which were allowed by the repealed laws of the Emperor Napoleon, Code Nap. art. 139. 227. 229. et seq. 234. et seq. and 275. were very similar to those allowed by the Novells.

[5] Nov. 117. c. 10. et 134. c. 11.

cient law, divorce by mutual consent [1]. Marriage after divorce was still permitted by the laws [2], and seems to have been of frequent occurrence, though the abstaining from second marriages, which appear always to have been discountenanced by the church [3], was constantly recommended by Justinian.

The Ostrogoths allowed the privilege of divorce to both husband and wife, but only for certain specified causes. The wife might claim a divorce if the husband were convicted at law of murder or sorcery, or of violating tombs; the husband might divorce his wife if she were convicted of adultery or sorcery, or if she acted as a procuress [4]. As to the power of marrying again, the parties were to be governed by the laws and customs then in force,

[1] "Contigit enim," says the emperor, "ut ex his nonnulli ad mutuas insidias procederent *venenisque* et aliis quibusdam quæ *lethalia* essent uterentur." See Novell. 140. præfat.

[2] Novell. 22. c. 15. and 37. as explained by Cod. Just. v. 5. 1. Novell. 117. c. 7. § 2. &c.

[3] St. Paul's Epistle to the Romans, c. vii. v. 1. et seq. 1 Corinthians, c. vii. By the 10th canon of the council of Arles, which was held A. D. circ. 314, and which was attended by bishops from all parts of Christendom, it was directed that Christians should be *exhorted* not to marry again during the lifetime of their wives, after having divorced them for lawful cause. Fleury, Hist. Eccles. tom. iii. liv. 10. c. 14. and 15. Mœurs des Chrétiens, p. 229.

[4] Agagula, conciliatrix. Edict. Theod. c. 54. The

by which the Roman law is probably referred to [1].

The Visigoths also prohibited divorce excepting for cause defined; if the husband could publicly convict his wife of adultery, the marriage was dissolved, and the wife was delivered by the judge to the husband, to be disposed of as he should think proper. The wife might obtain a divorce if the husband authorised or permitted a stranger to offer violence to her person [2], or if he were guilty of the most detestable of vices [3]. When the wife obtained the divorce, it was lawful for her to marry again, but not if divorce were adversely pronounced against her.

The codes of the Bavarians and Lombards permitted the husband to put away his wife, for similar causes to those above specified [4]; and if a man were willing to submit to the penalties imposed by the law, namely, the forfeiture of a certain sum of money, he might, as it would appear, put away

rescript of Constantine, Cod. Theod. lib. iii. tit. 16. is to the same effect.

[1] "Nubendi vero vel non nubendi licentiam pro constitutis veteribus sortiatur." Edict. Theod. ubi sup.

[2] This was also subsequently allowed as good cause of divorce amongst the Francs. See Beaumanoir, p. 293.

[3] Of this vice the Germans were ignorant until corrupted by the Romans. Heinnec. El. Jur. Germ. lib. ii. pl. 2. § 149.

[4] Bavar. tit. 7. c. 14. § 1. Long. ii. 13. 1. However, the precise causes of divorce are not stated in the codes.

his wife at pleasure, and take another [1]. Among the Burgundians, if a woman legally married attempted to put away her husband, she was ignominiously put to death by being stifled with mud [2].

The Francs, besides the above-mentioned causes of divorce, allowed in practice various others. Thus, if the husband were reduced to slavery, or compelled to fly the kingdom, the wife was permitted to marry again [3]. There are two formulæ in the collection of Marculphus, and in those of Anjou, of charters of divorce executed by the parties, the one to the other, in which are contained clauses authorising either party to marry again [4]. Gregory of Tours mentions the circumstance of a man who himself put away two wives, marrying a woman who took him for her third husband [5]. The Merovingian

[1] Long. ubi sup. et v. Leg. Rip. tit. 35.

[2] Burgund. tit. 34, § 1. "Corpore infames cœno et palude injecta super crate mergunt." Tac. de Mor. Germ. c. 12.

[3] V. Greg. Turon. lib. ix. c. 19. Capit. Peppini Ann. 752. § 9. Beaumanoir also mentions this ancient custom, p. 293.

[4] Marculph. Form. lib. ii. c. 30. edit. Lindenb. 84. *libellus repudii.* Histor. Franc. tom. iv. p. 498. Form. Andegav. No. 56. Form. Sirmondicæ. Baluze, tom. ii. p. 479. The formularies of divorce in use amongst the Jews were very similar to the above. "Ecce licita sis viro cuicunque," &c. Uxor Ebraica, lib. iii. c. 24, &c.

[5] Greg. Turon. lib. ix. c. 13.

kings exercised the most unbounded licence in this respect, taking wives and divorcing them at pleasure [1]. Pepin greatly restrained the licence of divorce and of second marriage [2]. Charlemagne, by a capitulary inserted in the law of the Lombards [3], and which was the general law of his empire, directed that no woman divorced should marry again during the life of her former husband, nor should a man, while his former wife was alive. Yet this emperor divorced his wife Bertha, daughter of Desiderius, king of the Lombards, and married Heldegarde, by whom he had issue Louis le Debonnaire, his successor [4].

Amongst the Anglo-Saxons, divorce was permitted for cause of adultery; it might also be obtained by mutual consent; but, in the latter case, the parties were not allowed to marry again [5].

[1] Greg. Turon. lib. v. c. 49, &c. and see as to Gontran, Chilperic, and Cherebert, Mezerai, Abregé Chronologique, at the end of the reign of Cherebert, eighth king.

[2] Cap. Pepin. A. D. 752. § 10. 17. and 21. A. D. 757. § 3. and 8. Histor. Franc. tom. v. Baluze, tom. i. p. 159. 164. 166.

[3] Lib. ii. 13. c. 4. Baluze, tom. i. p. 228.

[4] Aimoin. lib. iv. c. 68. Uxor Ebraica, lib. iii. c. 30.

[5] "Si liber homo cum liberi hominis uxore concubuerit, ejus weregild redimat, et *aliam* uxorem propria pecunia mercetur, et illi alteri eam adducat." Wilkins, p. 4. A law of Æthelbert, Northumb. Presbyt. leg. § 65. Liber Canon. Wilk. p. 154. Et conf. Capit. Aquisgranens. A. D. 789. Baluze, to. i. p. 209.

The canons, indeed, forbad second marriage in any case excepting after the death of the former husband or wife [1]. It remains to consider the relationships of parent and child, and guardian and ward.

[1] Lib. Canon. Wilk. p. 154.

CHAPTER XIII.

PARENT AND CHILD, GUARDIAN AND WARD.

Parents and children.

ALL the children of the ancient German were equally cherished by him, and it was one of the highest honours to be the father of a numerous family [1]. Little is to be found in the codes as to paternal power, excepting in regard to the marriage of females. The law of Theodoric prohibiting parents from selling their children was made rather to guard against the introduction of a Roman custom amongst his barbarian subjects, than to take from them a power they already enjoyed [2]. The father and mother, grandfather and grandmother, were, by the laws of the Visigoths, permitted to use moderate correction to the children living under their roof. If a child were guilty of ingratitude or irreverence towards its

[1] Tac. de Mor. Germ. c. 19, 20.

[2] Edict. Theod. c. 94, and see, to the same effect, Vis. v. 4. 12.

parents, on complaint being made to a magistrate, the child was liable, on conviction, to receive fifty stripes, besides which, he was deprived of all right to share in the succession of the offended parent, unless expressly forgiven [1]. Among the Lombards, children lived under the law of their father, and if he became a religious, they continued under the law to which the father was subject at the time of their birth [2].

Adoption.

Amongst other customs which were adopted by the Barbarians, altogether from the Romans [3], was that of adoption. At the time when the codes were compiled, if a man had no children of his own, he might adopt a stranger to enjoy the rights of a child; but if the person to be adopted were a minor, the consent of his father, if living, must first be obtained. The ceremony of adoption was performed in two ways, namely, by the delivery of symbols, usually arms, to the adopted child, and an accompanying declaration, announcing the adoption [4], or by a solemn act in writing, executed

[1] Vis. iv. 5. 1. Ingratitude in children was always severely punished amongst the Romans. Before the time of Justinian, it was left to the judge to determine whether the child complained of had been guilty of ingratitude. Justinian defined the various acts and omissions, fourteen in number, which were to be punished as ingratitude. Novell. 92. ib. 22. and 115. c. 3.

[2] Long. ii. 5. 1.

[3] Heinnec. El. Jur. Germ. lib. i. § 155.

[4] Vide Greg. Turon. lib. vii.

in the presence of witnesses [1], and attested by a magistrate, or by a judge. The Lombards also allowed a man to place his *natural* children on an equality with his legitimate issue, if he could obtain the consent of the latter after they had attained the age of twelve years [2].

Minority and guardianship.

The ancient system of the Germans in regard to guardianship was, as we have seen, extremely simple: The sons, when of sufficient age, were presented with arms, became members of the commonwealth, and left their parent's house. The daughters were always under the guardianship of the father or nearest capable relations. Various laws relative to guardianship were introduced among the Barbarians after their settlement in the south [3].

Among the Visigoths, every child was an *infant* until the age of fourteen, during which time the parents, if living, were the natural guardians. Fifteen complete was the age of majority amongst

c. 33. "Guntchramnus, rex Francorum, quum liberos mares non susciperit, Childeberto ad se vocato, porrexit hastam, addiditque, hoc est indicium quod tibi omne regnum meum tradidi," &c. Et v. Rip. tit. 48.

[1] Rip. ubi sup. Longob. ii. 14. 13. Form. edit. Lind. 58, &c. which is the form for completing adoption before the *curia publica* and *defensor civitatis*, precisely according to the Roman method.

[2] Long. ii. 14. 3. v. *ante*, p. 371. note (2.)

[3] See on this subject generally, Heinnec. Elem. Jur. Germ. lib. i. § 360.

the Ripuarians and Burgundians [1]. Amongst the Anglo-Saxons, a daughter, at the age of thirteen or fourteen, had the disposal of her person: a son at fifteen might choose his course of life [2].

Infants, amongst the Visigoths, could not bring or defend actions, nor contract nor dispose of their property by will, except in their last illness [3]. The child, amongst most of the Barbarian nations, was a minor from the age of fourteen to twenty-five years [4], the parents, if alive, continuing to be the guardians; but during this period, the child might perform various civil acts. If the mother died, the guardianship of the minor and his property belonged to the father; so when the father died, it belonged to the mother [5]; but this, as to both, was under certain conditions. The mother become guardian was bound, immediately that she entered on the office, to make an inventory of the property of the minor, in order that it might be known that the whole of his property was delivered to him when by law entitled to receive it. If the mother married again, she lost the office [6],

[1] Rip. tit. 74. and 81. Burg. tit. 84. § 1. and 2.

[2] Turner, iv. p. 55.

[3] Vis. ii. 5. 11. Ib. ii. 4. 11. iii. 1. 7. and 18.

[4] Vis. iv. 3. 1. Leg. Rip. et Burg. ubi sup. So, in an ancient charter of the time of Charles the Bald, there is this expression: "legitima tempora, id est 25 ætatis annos."

[5] Vis. iv. 3. 2. Simil. Burg. tit. 85. § 1.

[6] According to the old Roman law, the mother, in un-

and it immediately belonged to such brother as had attained the age of twenty-five years. The father become guardian, if he remained a widower, was not compelled to make an inventory; if he married again, he had his option to renounce the guardianship, or to retain it on the following terms: 1. He must make and sign before a judge an inventory of all the property belonging to the ward; and, 2. He must enter into a bond with a sufficient penalty, to the nearest capable relation of the minor on the *mother's* side [1], that he would protect the person of the minor, and preserve his property entire [2]. If there were no father nor mother, and no son of the age of twenty-five years complete, the uncle or nearest male cousin on the father's side might claim the office, if properly qualified in respect to age, and not otherwise objectionable. In default of these, one of the nearest relations of the minor was selected before the judge of the place to exercise the office. If the mother were dead, and the father refused, the selection was made from the relations on the mother's

dertaking the office of guardian, was compelled to swear that she would not marry again. Cod. Just. v. 35. 2. Justinian, Novell. 92, altered this law in favour of the widow.

[1] "Sororum filiis idem apud avunculum qui apud patrem honor, quidam sanctiorem arctioremque hunc nexum sanguinis arbitrantur," &c. Tac. de Mor. Germ. c. 20.

[2] Burg. tit. 85. Vis. ubi inf.

side. All guardians other than the unmarried father were compelled to make an inventory [1]. It appears that in latter times the Roman custom of allowing the parent to nominate by will a guardian, *testamentarium tutorem*, was introduced [2].

The guardian was compelled to keep the property itself entire, but he seems not to have been liable to account for the profits; these were to be applied towards the expenses of the family. The ward, male or female, was entitled to receive, at the age of twenty, or day of marriage contracted according to law, one half of his or her property. The guardian, when the father or mother exercised the office, might enjoy for life the remaining half of the property, provided he or she did not enter into second marriage. The mother, immediately on her second marriage, lost, with the office, all right to any usufructuary benefit. The father who married again was compelled to give up the whole of the property to the ward on his attaining the age of twenty, or day of marriage, thus losing the right of retaining one-half, which, as before mentioned, he was entitled to if he remained a widower. The ward, on attaining the age of twenty-five, might apply to the judge to have all acts of disposition made in favour of or

[1] Vis. ubi inf. Æmil. Dig. xxvi. 7. 7. pr.

[2] Form. ed. Lindenb. 74.

under the influence of his guardian set aside [1], unless they had been made for a valuable or *bonâ fide* consideration. Prescription in favour of such acts only commenced to run from the majority of the ward [2].

Among the Lombards, children were considered as minors until the age of eighteen, and as such were in general prohibited from performing civil acts [3]. They appear to have remained with their relations; but the king, and under his authority the judges and royal *missi*, had the especial protection of their interests [4]. The law permitted the minor of the male sex to contract marriage, to pay the nuptial price, to endow his wife, and to give the morning gift [5]. If the father of the minor at his death left any debts, or if the minor were in want, part of his land might be sold, but it was the duty of the judge in either case to see that no more was sold than was absolutely requisite to pay such debts [6], or to relieve the present necessity. A minor was entitled to have a

[1] Simil. Novell. 72. c. 5.

[2] As to this section, see Leg. Vis. iv. 2. 13. and 14. and title 3. throughout, and Leg. Burg. tit. 85; also the formulary above cited. The laws of Lothair and Edric, § 6. and of Ina, § 38. show that similar regulations prevailed amongst the Anglo-Saxons.

[3] Long. ii. 29. 1.

[4] Ibid. ii. 29. 1. 3. 4. and 7.

[5] Ibid. ii. 29. 6.

[6] Simil. Rip. tit. 79.

partition of the succession of his ancestors made between himself and his coheirs. He might in his last illness dispose of any part of his property to pious purposes [1].

[1] Long. ii. 29. l. 3. and 7.

CHAPTER XIV.

OF THE DIFFERENT KINDS OF PROPERTY MENTIONED IN THE CODES.

THE Barbarians paid little regard to any species of property excepting land; indeed it was the principal property they possessed; the Romans, freedmen, and persons in the inferior classes of society being alone engaged in commerce or any lucrative employment: and though the Roman distinction between moveables and immoveables is to be met with in most of the codes, the laws of inheritance which they contain relate almost entirely to land. In early times, the land held by the Barbarians was of three kinds[1]; 1st, the alodis or ancient heritage; 2dly, land acquired by absolute gift, or by purchase; 3dly, land held in vassalage. The term alodis appears to have been originally confined amongst the Francs and Lombards to the land which had descended from ancestor to heir,

Different descriptions of land.

Alodis.

[1] V. Leg. Long. ii. 14. 1. et Rip. tit. 56. al. 58.

from the time of the original partition or distribution. Thus, by the code of the Lombards, a person claiming the *alodis* or *heritage* of a deceased person, as heir, was bound to trace his pedigree upwards to the first possessor. The ancient Sueones and Goths had also their ancient heritages[1], and Justinian mentions that amongst the Armenians there were lands of a similar description, which were called *geniarchica*, or *progenitorialia*[2]. In early times, care was taken to preserve the heritage in the original family. But the gradual extension amongst the Barbarians, of the liberty of alienation, by gift and devise, soon diverted the greatest part of these heritages from the direct channel[3]. Hence, in process of time, *alodis* came to be used to denote *any* land not held in vassalage, which a man took by descent from his ancestor, as distinguished from that which he acquired by gift or purchase[4]. The

[1] See the note of Dr. Wilkins, as to bona *allodialia hæreditaria* sive *avita* of the Veteres Sueones et Gothi. Leg. Anglo-Sax. p. 43.

[2] Edict. iii. c. 1. § 2.; and see Novell. xxi. c. 2.

[3] Vide Formul. edit. Lindenb. 18. 48. 49. It would appear that, amongst the Anglo-Saxons, unlimited licence of alienation by gift and will prevailed in the 9th century. See the *charters* recorded in Ingulphus, Thorn, and the *wills* in the Appendix to Lye's Dictionary.

[4] This latter description of land is called *terra acquietata* in the compilation which goes by the name of the laws of Edward the Confessor. Wilkins, Leg. Anglo-Sax. p. 205, et v. Leg. Cnuti, § 76. ib. p. 146. Amongst the Francs it was sometimes called land

same appellation was given to land assigned for dower [1]. Afterwards the word *alodis* obtained a wider signification, and came to signify all the land to which a man was entitled absolutely, in opposition to that which was held in vassalage [2]. From the time that alodis obtained this extended signification, the ancient heritage amongst the Salic Francs was distinguished by the appellation of *terra Salica.*

The *Bocland* mentioned in the Anglo-Saxon codes answered to the alodis of the continental nations. The alodis of the Anglo-Saxons appears to have acquired the name of *boc*land from this—that the title to land claimed by allodial right was evidenced by charters, whereas he who claimed title to land held in vassalage, or *folcland*, as it was called, had no charters to evidence his title, the ownership of the soil, or allodial right, being in his lord [3]. Anglo-Saxon bocland. Folcland.

Amongst the Anglo-Saxons, land might be given for life, or for years, or upon condition, or it might be limited to the descendants of the

[1] *de comparato.*" Form. ed. Lind. 49. "Tam de *alode* quam *de comparato*," &c.

[2] Form. edit. Lind. 51. Lindenb. Gloss. hac voce. Of these descriptions of land, see Heinnec. Elem. Jur. Germ. lib. ii. § 12. and 13.

[3] Leg. Cnut. § 75. Wilkins, p. 145. Ib. p. 205. "Quia proprior erat ut terram haberet qui cyrographum habebat." Hist. Eliens. c. xxxv. Gale, p. 479.

grantee, and rendered inalienable by them[1]. Mortgages and leases of land, also, were familiar to the Anglo-Saxons[2]. Numerous grants of *maneria*, which appear to have been the same as the *mansi* of the continental nations, together with the slaves attached to them, are recorded by the Anglo-Saxon annalists[3]. These maneria, or manors, appear to have been portions of demesne land, which the great landed proprietors held in their own hands; and to which, for their convenient cultivation and occupation, a certain quantity of slaves, both rustic and domestic, were attached.

Manceria.

Mansi.

[1] Si quis terram hæreditariam (*boclande*) habeat, quam parentes ejus ipsi reliquérunt," et reliqua. Leg. Alfred. c. 37. et V. Leg. Hen. I. Wilk. p. 266. The statute *de donis conditionalibus*, passed 13 Edward I., appears to have been partly an attempt to revive the ancient laws for preserving the heritage in the same family. Compare its provisions with the above cited law of Alfred's code; et v. Wilk. p. 277.

[2] Turner's Anglo-Saxons, vol. iv. p. 207. et seq. Leg. Alf. § 37. Kelham's Domesday, p. 241. 275. &c.

[3] Ingulph. p. 863. 913. &c. Thorn. 1776-7-8. The slaves attached to these manerial were denominated naifs by the Anglo-Normans. Leg. Will. I. § 33.

CHAPTER XV.

LAWS AS TO INHERITANCE.

OF all the Barbarian codes, that of the Thuringians retains the most evident traces of the ancient German usages; it may be proper, therefore, separately to notice the laws of the Thuringians as to inheritance. By the Thuringian law, sons, according to the ancient German custom, took the whole succession of the father dying intestate, both the heritage or lands, and the moveables; if there were no son, the daughters took the money and slaves, but the land passed to the male relations in the nearest degree. If there were no daughters, the sisters of the deceased took the money and slaves, but the nearest male relation on the father's side took the land. If there were neither son, daughter, sister, or mother, the nearest male relation took the whole succession, moveable and immoveable. This exclusive right of the males, in regard to the land, extended to the fifth degree inclusively; but if no males within those degrees existed, the females in

the nearest degree were allowed to take the whole succession [1].

The laws of the other Barbarian nations allowed children, or their representatives, to exclude all other relations [2]. In default of children, the father or mother, brothers and sisters, or other relations in the nearest degree [3], took in general the whole succession [4]. By the Salic law, no female was permitted to inherit the *terra Salica*, or that part of the land of an intestate which had descended from his ancestors [5]. So, by the law of the Ripuarians, females were excluded from the land which had so descended to the intestate, which is in that code denominated *hæ-*

[1] Leg. Thuring. tit. vi. § 1. 2. 3. 4. and 8.

[2] See Heinnec. Elem. Jur. Germ. lib. ii. § 217.

[3] Of the computation of degrees, which was adopted from the Romans, see Heinnec. Elem. Jur. Germ. lib. ii. tit. 13.

[4] Vide Leg. Sal. tit. 62. Rip. tit. 56. Burgund. tit. 44. § 1. 2. Alam. tit. 57. and 88. Bavar. tit. 14. c. 8. and 9. Saxon. t. 7. § 1. 4. Edict. Theod. c. 23. and 24. "Nam omnem *hæreditatem*, qui gradu alterum præcedit, obtineat." Leg. Vis. iv. 2. 1. and 10. "Sic tamen ut ille qui succedere vult (ad hæreditatem) nominatim uniuscujusque nomina parentum suorum antecessorum dicat," &c. Leg. Long. ii. 14. 1. By the nineteenth section, which was introduced by Liutprand, *daughters* were admitted to take in default of sons.

[5] Leg. Sal. 62. De Alode § 6. "de terrâ *vero* Salicâ in mulierem nulla portio hæreditatis transit, sed hoc virilis sexus acquirit, hoc est, filii in hæreditate succedunt." Edict. Heroldi. Mons. Eccard, in vol. iv. of the French Historians, p. 156, the Abbé Vertot, Memoires de l'Academie des

reditas aviatica, so long as any heir of the male line existed [1].

Amongst the Goths, males and females of the same degree equally divided between them the succession of the intestate [2]; but, according to the codes of most nations, males excluded females of the same degree [3]. The Burgundians gave the ornaments and apparel of the mother dying intestate,

Inscrip. to. ii. p. 610. 611., Mons. de Foncemagne, ib. to. viii. p. 491., and other writers, have endeavoured to deduce the origin of fiefs from this law. Montesquieu, who, in his translation of this section, has unaccountably suppressed the important word *vero*, has also endeavoured to found a theory upon it. The Abbé Mably, in his Observations sur l'Histoire de France, has given the best exposition of the original meaning of the terms *terra Salica*.

[1] "Sed dum virilis sexus extiterit femina in *hæreditatem aviaticam* non succedat." Leg. Rip. tit. 56. § 3. The laws of the Ripuarians, tit. 56. which, as well as the first five sections of the laws of the Salic Francs in regard to inheritance, tit. 62. are very similar to those in the twenty-seventh chapter of the book of Numbers, are to be found, with some verbal variations, in the laws of Henry I. of England, recorded in the Red Book of the Exchequer. See Wilkins, p. 366. Coke upon Littleton, 11 a. and 1. Peer Williams's Reports, 49. 50.

[2] Edict. Theod. c. 23. 24. Vis. iv. 2. 1. Justinian had abolished the distinction in this respect, which existed in the Roman law, between males and females. Novell. xviii. c. 5.

[3] Leg. Rip. 56. § 3. Sal. tit. 62. Formul. edit. Lind. 66. Leg. Sax. c. 7. § 1. Alam. et Bavar. alii; supra. There were some eccentricities in the laws of inheritance in regard to females; see particularly Leg. Burg. tit. 14. § 2.; and Esprit des Lois, liv. xviii. c. 22. which arose from the ancient German custom of exclusion being in part retained.

exclusively to the daughters [1]. Latterly the Lombards and Salic Francs allowed the issue of a deceased child to represent his parent in the succession of the grandfather or grandmother [2]. According to the law of the Saxons, the son of a deceased son excluded from the succession females of the first degree [3]. In general, uterine brothers and sisters could alone share the succession of the mother; all the children indiscriminately took that of the father [4]. Brothers and sisters of the half blood were excluded from the succession of a deceased brother or sister [5]. With the Burgundians, sisters, if there were any, totally excluded brothers from the succession of an unmarried sister [6]. Amongst the Anglo-Saxons it may be collected, that the children, or other relatives in the nearest degree, succeeded to the heritage of the deceased dying intestate, though the laws are not explicit on the subject of inheritance [6].

The Lombards allowed natural children to take some share of the inheritance [7]. Thus, if there

[1] Leg. Burg. tit. 51. c. 4.

[2] Long. ii. 14. 18. a law of Grimoald. Decret. Childeberti, § 1.

[3] Leg. Sax. tit. 7. c. 6.

[4] Leg. Bavar. tit. 14. c. 8. § 1. Vis. iv. 5. 4.

[5] Leg. Burg. tit. 51. c. 5. and 6.

[6] V. Leg. Ethelbert. Wilk. p. 7. Leg. Canut. § 68. Bromt. 929. Leg. Lothar. § 6. Leg. Inæ, § 38. Leg. Edov. Wilk. p. 266.

[7] *Natural children* were the offspring of a female who lived in wedlock with a man who had not constituted for—

was one son born in full marriage, that is, marriage contracted with the requisite forms to give the wife all matrimonial rights, and one or more natural sons, the son born in full marriage took two-thirds, the natural son or sons the remaining third[1]. Illegitimate children, the offspring of intercourse with a female slave, had no rights over the property of an intestate[2].

Sons and daughters, among the Ripuarians, appear to have taken the heritage of their parent discharged of all incumbrances, the legal compositions and fines due from him being first deducted; but all other relations, who received to the value of one solidus from his succession, or who had received his weregild or value, in case of his having been killed, were bound to pay his debts,

her a *libellum dotis*. Vide Form. edit. Lindenbroc. 60. Et vid. Heinnec. Elem. Jur. Germ. lib. i. tit. 13. § 306. This sort of marriage was called Matrimonium *ad legem Morganeticam*. According to the Roman law, from the time of Justinian, natural children, the offspring of single concubinage, had certain rights, in concurrence with their mother, over the succession of their father dying intestate. Novel. xviii. c. 5. But when the father had various children by different concubines, the right to succeed was not extended in favour of such children. Ibid. Natural children became legitimate by the subsequent marriage of the couple. Novel. xviii. c. 11.

[1] Leg. Long. ii. 14. 2. As to their rights in common with legitimate daughters, vid. ibid. c. 7. et seq.

[2] Leg. Long. ii. 14. 5. Bavar. xiv. c. 8. § 2.

and to warrant (idionare), his acts of disposition [1]. Amongst the Burgundians, the heir or successor was in all cases liable for the debts of the ancestor, unless he renounced the succession. Even if a man were hung as a thief, his heritage descended to his heirs [2].

Inheritance of land held in vassalage.

From the time that the royal benefices became hereditary, the land held in vassalage of subjects also became hereditary. Amongst the Anglo-Saxons, the heir to a royal benefice, or to vassalage land, was bound to pay to his lord a certain sum by way of relief, or hereget, before he was entitled to enter upon the land held by his ancestor [3].

Primogeniture.

The first notice that we have of the right of primogeniture is in the treatise entitled the laws of Henry I. where it is declared that the eldest son shall take the principal *feudum* of his ancestor [4].

[1] Leg. Rip. tit. 67 and 79. Et vide Leg. Thuring. tit. 6. § 5.

[2] Leg. Rip. tit. 79. "Ille solus judicetur culpabilis, qui culpanda commisit, nec successores aut hæredes pro factis parentum ullum periculum pertimescant." Vis. vi. I. 8. which is one of the most ancient laws of the code. See to the same effect, Leg. Burg. tit. 47. § 3. The same equitable principles are to be found in the Roman law; see the opinion of Paulus, Dig. xlviii. 20. 7. et *v. ante*, p. 198.

[3] Leg. Kanut. Bromt. 930. Hist. Rames. c. lxvi. Gale, p. 430. Domesday, ibid. p. 763, 775.

[4] Will. p. 266.

CHAPTER XVI.

LAWS IN REGARD TO THE ALIENATION OF PROPERTY.

THE *Saxons* and *Lombards* would not permit a man, by any act, excepting in favour of the king or the church [1], or excepting his children were guilty of ingratitude [2], to dispose of his *heritage* away from his children, unless compelled by absolute necessity [3]. Under Luitprand, king of the Lombards, the parent was authorised to dispose of a certain portion of his property away from his lawful heirs; if daughters, to strangers; if sons, to daughters [4]. Amongst the Anglo-Saxons any one might by deed entail an heritage so as to make it inalienable [5].

Amongst the *Visigoths*, previously to the time

[1] Leg. Sax. tit. 14. § 2.

[2] Leg. Long. ii. 14. 1. 12. and 13. Et vide Novell. xcii.

[3] Leg. Long. ii. 15. 2. Simil. Leg. Rip. tit. 48.

[4] Long. ii. 20. 1. 1. and 2.

[5] Leg. Alf. § 37. Ante, 391.

of Chintaswind, A. D. circ. 642, custom had authorised the greatest latitude in the power of disposition; that king, however, introduced, or rather re-established various regulations, by which parents, when they had children or grandchildren who did not by ingratitude forfeit the countenance of the laws, were prohibited from bestowing more than one-third of their property for the bettering of any particular child or grandchild [1], or more than one-fifth of the residue on freedmen, the church, or strangers; and this was the utmost extent to which they might affect their heritable property [2].

Gifts made by the parent to a child on or after marriage were good as against the parent; but when the succession of the parent opened, if such gifts exceeded the amount of such child's share of the disposeable portion, each of the other co-divisees might take a portion equal to such excess, and the remainder was divided equally among the

[1] So by the Ripuarian law, no one was allowed to leave to any one child more than the value of twelve solidi above the portions given to the others. Leg. Rip. tit. 59. § 9. There is a precedent for such a grant, form edit. Lind. 56. "Igitur ego in Dei nomine, dum et me jam senectus adgravat, et necessitates, ut oportet, procurare non valeam; et tu mihi in necessitatibus meis solatium præbere non desistis, ut die noctuque deservire non desistis ideo," et rel.

[2] By the Code Napoleon, the parent is bound to leave a proportion of his property, called the *portion hereditaire*, to his children. Code Napol.

whole. If the succession were not of sufficient magnitude to admit of this mode of settlement, the bettered child was bound to bring in[1] or account for the gifts so received above the disposeable portion[2], and then the division was made. According to the same code, if a man left no children or grandchildren, he might dispose of his property as he pleased[3]. A woman who had children or grandchildren was prohibited from giving more than one-fourth part of her dower to the church, to freedmen, or to strangers; the remainder must be left to the children or grandchildren, in such proportions as she thought fit; however, if she had children of two different marriages, she must leave the undisposeable part of the dower she had received from each husband to the children procreated by such husband.

Custom, among the *Burgundians*, had originally

art. 913; and see Coffimeres, p. 305. According to the law of England when Bracton wrote, the testator was at liberty to dispose of one-third of the clear residue of his goods as he pleased; one-third went to his children, and the remaining third to the widow. Bracton, de Leg. fo. 60. b.

[1] By the Roman law, as settled by Justinian, whether the parent died testate or intestate, all gifts as dowry, &c. were directed to be brought in by each child, unless the parent had declared that such gifts were to be beyond such child's share. Cod. Just. vi. 21. 17. Novell. xviii. c. 6.

[2] Simil. Leg. Long. ii. 14. 15.

[3] Leg. Vis. iv. 5. l. 1. and 3. iv. 2. 20.

prohibited the parent from disposing, at his death, of any part of his heritage. By the code of the Burgundians, the parent, after giving suitable portions to his children [1], might dispose as he pleased of the residue reserved to himself [2]. In case a portioned child died intestate, the father enjoyed the portion of such child for his life; but he must transmit, at his death, the portion unimpaired, to be divided among the surviving children, in the order prescribed by the law [3]. The *Thuringians* appear to have put no restraint on alienation [4]; nor did the *Alemans*, when the church was to be benefited [5]. A person might dispose of the land which he acquired by purchase in any manner he chose, either by gift or by will [6].

[1] The second section of this law, cited below, may seem to confine the word *filii* to sons only; but, from the whole context, it appears that children generally were intended.

[2] The law of the Bavarians contained a similar provision. Tit. i. c. 1.

[3] Leg. Burg. tit. 51. Ibid. tit. 14. The same law, tit. 84. § 1. prohibited a man from disposing of his land, excepting to a man who already possessed an allotment in the kingdom. "Quia cognovimus," says the law, "Burgundiones suas sortes nimia facilitate distrahere."

[4] Thuring. tit. 13.

[5] Alam. cap. i. § 1. and 2.

[6] V. Wilkins, p. 205. 206.

CHAPTER XVII.

OF TESTAMENTARY DISPOSITION.

THE forms of testamentary disposition, which was unknown to the Germans, were entirely derived from the Romans [1]. The principal regulations concerning them are contained in the laws of the Visigoths [2]. With them, the following wills were effectual; 1. That which the testator and witnesses *signed* and attested by writing their names; 2. That which was *sealed* by the testator and witnesses; 3. That which, the testator being unable to write or affix his seal, was signed or sealed at his request by a third person [3], and attested by witnesses; 4. A person in circumstances of urgent

Different forms of making wills.

[1] "Et nullum testamentum." Tac. de Mor. Germ. Heinnecc. Elem. Jur. Germ. lib. ii. § 145. As to wills according to the Roman law, v. *ante*, p. 125.

[2] The law of the Lombards contains provisions which are the same in principle. Lib. ii. 18. c. 2. and 3.

[3] Vide Novell. lxxiii. c. 8. Cod. Just. viii. 54. 20.

danger might declare *by parol*, before witnesses, what was his will. Wills of the first and second description were directed to be published before a *bishop* within six months after the death of the testator. As to wills of the third description, it was directed that the person deputed, together with the witnesses, should, within six months after the testator's decease, swear before a judge, or a *bishop*, that the will was, actually and without fraud, the will of the deceased, and that he and they had been requested to sign or seal, and attest such will. It was essential that a will of the fourth description should, within the same space of time, be written, subscribed, and confirmed by the oath of the witnesses, before a judge or a *bishop* [1]. A man on a journey, or engaged in any public expedition, might, in case of urgent necessity, and where no freemen were present, dictate a will even to his slaves [2]; but the bishop or judge before whom it was proved was directed to examine very particularly whether there was any fraud. If the judge or bishop were satisfied as to the *bona fides*, the will was reduced into writing, and be-

[1] Leg. Vis. v. 2. 12. The bishop is not always expressly coupled with the judge in the law; but it may be collected that he had concurrent authority with the judge as to probate of every species of will.

[2] This was adopted from the Roman law. See Dig. xxviii. 1. 28.

came an effectual will [1]. 5. When witnesses could not be procured, a *holograph* will, that is to say, written throughout in the testator's own hand, and signed by him, was good. A will of this description, if it had the day and year clearly expressed in it, might be carried into effect any time within thirty years after the date; but the person in whose favour it was made must, within six months after it came into his possession, present it to the bishop or to a judge. The bishop or judge to whom it was presented was directed to procure three other writings written by the same person [2]; and if, on inspection of them, he was convinced that the hand-writing in the will was that of the testator, the will might be established by the signature of the bishop or judge, or of a certain number of free witnesses. Wills, amongst all the Barbarian nations, usually contained a considerable donation to some church, and a request that it might be deposited in the archives [3], and that the clergy would see to the execution of the will. In process of time, it became almost a

[1] Leg. Vis. ii. 5. 13.; and see similar provisions, Dig. xxi. 1. 1.

[2] Leg. Vis. ubi sup. and Long. ii. 34. 12. The Romans also used this method for proving handwriting. Cod. Just. iv. 21. 16. Novel. 73.

[3] By the Roman law, it was directed that wills should be deposited *in æde*, and a copy given to the heir. Dig. ii. 4. 3. et v. ibid. l. 5.

principle, that no will could be valid without a pious donation [1]; hence arose the jurisdiction which was very generally claimed by the church as to the execution of wills, the placing of seals, and the completing the inventory [2]. If a man, despairing of having children, had, by adoption or by will, or by any other act, disposed of his property, the subsequent birth of a child annulled such act [3]. No act of disposition was allowed to take effect which had been extorted from fear or by violence [4].

[1] It had been a common practice with the Romans to leave money to freedmen to celebrate the memory of the deceased. Dig. xxxiv. i. 18. 4. &c. xxxiii. 2. 16.; which custom was superseded by that of giving legacies to the church to purchase masses.

[2] See Greg. Turon. lib. vi. c. 4, 6, 8. lib. vii. c. 7. Formul. ed. Lind. 71. 72. Heinnecc. Elem. Jur. Germ. lib. ii. § 179. 188. Beaumanoir, p. 56. et seq. and see Fleury's seventh discourse on Ecclesiastical History, chap. 9. also Novel. cxxxi. c. 11. Selden considered that the jurisdiction of the spiritual courts in England in regard to the proof of wills, &c. was originally a *mere usurpation*. See, on this subject, Hensloe's case, 9th Coke's Rep. 37. b. et seq. and the notes.

[3] Leg. Long. ii. 14. 13.

[4] Leg. Vis. ii. 5. 9. Ibid. v. 2. 1. Bavar. tit. 15. c. 2. § 2.

CHAPTER XVIII.

OF GIFTS AND SALES.

THE essentials of a gift consisted in delivery, and of a sale, in payment of the price and delivery; both must be in good faith [1]. If any writing were drawn up, it was only with a view to evidencing the completion of these essentials [2]. The most usual mode of giving possession was by the delivery of a rod [3], or, if land were the object, sometimes by

[1] Vide Edict. Theod. § 147. Vis. v. 4. 3., which are apparently borrowed from Cod. Just. ii. 3. 17.

[2] A formulare of Marculphus, edit. Lind. 128. recites, "Licet empti venditique contractus, sola pretii adnumeratione et rei ipsius traditione consistat: ac *tabularum* aliorumque documentorum ad hoc tantum interponatur instructio, ut fides rei factæ et veri ratio comprobetur," &c. So amongst the Anglo-Saxons, "Nam quod hominis memoria transilit literarum indago reservat unde hoc legentibus est intimandum," &c. Preface to an Anglo-Saxon charter, quoted by Lord Coke, pref. to 6th Rep. fo. iv. b. The law of the Visigoths as to sales, Leg. Vis. v. 4. 3. &c. very nearly follows the Roman law. See particularly Dig. xviii. 1. 35. Novell. lxxiii. c. 9.

[3] *Per fistucam*, Leg. Sal.

the delivery of grass or clods of earth from the land[1].

Public notary.

Sales and gifts were usually made in court, where a public notary, (*cancellarius*)[2], appointed by the king, attended to draw up in writing the instrument which was to evidence the transaction. If the subject of the transaction were of small value, it was sufficient that the instrument were attested by seven witnesses; but if of large value, twelve were required; the instrument, drawn up by the notary, was subscribed by himself and the witnesses. Every part of the transaction must be done in presence of the notary,

48. Form. ed. Lindenb. 48. 115. and 154. Lindenbroc and Spelman, in their Glossaries, *voce Fistuca*, mention various other symbols. A rod was made use of on all solemn occasions: thus the Salic law directed the person who wished to procure a debt due to him from another to be levied by the grave, to take a rod in his hand, and then to require the interference of the grave in a set form of words. Leg. Sal. 52. § 2.

[1] The delivery of a rod, and of earth and water, as the symbols of possession or sovereignty, are of the highest antiquity; as to the former, see Spelman, and Ducange, voce *Fistuca*. Of the latter, see Uxor Ebraica, part ii. cap. 2. Blackstone's Commentaries, Langhorne's Plutarch, Themistocles, vol. i. p. 288. Liv. Hist. xxxv. c. 17. and Herodot. iv. c. 126.

[2] Leg. Sal. edit. Herold. tit. 40.

[3] His office was similar to that of the *Tabellio* of the Romans. Cod. Just. iv. 21. 16. pr. Novell. xliv. c. 1. Selden's Titles of Honour, part I. chap. ii. Leg. Long. ii. 34. 12.; ib. ii. 40. c. 6. a law of the emperor Lothaire, where this officer is called *notarius*.

who was always answerable for the validity of the instruments drawn up by him; and the day and year must always be expressed in the instrument[1]. If a man had purchased a piece of land of another, and was unable to procure an instrument of sale to be drawn up in court, it was required in some nations that the purchaser and seller should go to the purchased land, taking with them six or twelve boys, according to the value of the property sold, before whom the price was to be delivered and possession given; the purchaser was then to lash the boys and pull them by the ears[2], that they might the better remember the circumstances when called on to give evidence concerning them. A gift or sale might be valid even without these formalities, if it was impossible to comply with them; in such case the sale must be established by the oath of the purchaser, and a certain number of cojurors, in proportion to its value[3]. The delivering and acceptance of earnest money, (*arrha*), bound each party to complete the contract[4]: and the vendor could not

Arrha or earnest.

[1] See precedents of acts of sale, Form. ed. Lind. 127. 128. et seq. et v. Vis. ii. 5. 1. and 2.

[2] So anciently amongst the Romans, the testator touched the ears of the witnesses to his will, and such witnesses were not required to sign or seal the will.—Terasson.

[3] Leg. Rip. tit. 59. 60. Bavar. tit. 15. Alam. tit. 43. Vis. vi. 5. 1. Burgund. Addit. 1. tit. 12. Long. i. 29. 32.; ii. 15. 1.

[4] Bavar. tit. 15. c. 10. Vis.

afterwards annul the bargain, even on the ground of insufficiency of the price [1]. The vendor of land was bound to defend the purchaser from being evicted, or to give him lands of equal value [2]. By the law of the Visigoths, if a man sold or gave away what he had no title to, he was bound to pay to the owner double the value of the thing sold, to restore to the purchaser the price he had received, to pay the penalties, if any, contained in the instrument of sale, and to make a compensation, to be estimated by persons in the neighbourhood, for all ameliorations done to the property by the purchaser [3]. If there was any defect in a chattel sold, it might be returned, unless the vendor would, with one cojuror swear, that at the day of sale he knew not of the defect [4]. A thing, concerning which there was a litigation, could not be aliened [5]. Exchanges were governed by the same laws as sales [6]. A division made between coheirs could not be set aside, even though no instrument in writing had been drawn up, if the transaction could be proved by re-

v. 4. 4. et v. Cod. Just. iv. 21. 17.

[1] Bavar. tit. 15. c. 9. Vis. 5. 4. 7.

[2] Bavar. tit. 15. c. 11.; ib. tit. xvii. c. 2.

[3] Vis. v. 4. 8. et v. Long. ii. 25. 1.

[4] Bavar. tit. 15. § 9.

[5] Vis. v. 4. 9. See to same effect, Novell. cxii. c. 1.

[6] Leg. Bavar. tit. 15. c. 8. Vis. v. 4. 1. Sal. tit. 39. Formul. edit. Lindenb. 139. 140.

putable witnesses[1]. Witnesses to every instrument were required to be men of good fame, not in indigence, and of the age of fourteen at least; and in general they were required to be free[2]. By the laws of the Anglo-Saxons, as will be more particularly mentioned under the title of *judicial proceedings*, it was provided that no chattel should be sold unless in the presence of a *gerefa*, or a certain number of witnesses.

[1] Leg. Vis. 10. 1. 1. et seq. Simil. Cod. Just. iv. 21. 9.

[2] Leg. Alam. tit. 42. Vis. ii. 4. 1. 2. and 3.; ib. v. 7. 12. &c. Burg. tit. 60. Justinian directed that farmers, and those of low degree, should never be called in as attesting witnesses, when those of higher degree could be procured. Novell. xc. c. 1.

CHAPTER XIX.

LAWS IN REGARD TO CONTRACTS OR OBLIGATIONS.

THE German nations being ignorant of merchandize, the artificial doctrines in regard to contracts which have place in commercial nations would of course be unknown to them; and as they continued for a long time after their settlement in the Roman provinces, to leave the cultivation of the arts, and the exercise of merchandize, to the Romans and persons of inferior rank who inhabited the towns, it will not be matter of surprise that there should be in the codes but few laws relating to contracts. All questions which arose amongst the Romans would of course be determined by the Roman laws. The following laws, in regard to loans, pledges, and interest of money, are the most material that are to be found in the codes.

If a man lent a sum of money to another, without any stipulation as to when it should be

repaid, and the borrower refused to return it on demand, by the law of the Francs the following course was to be pursued: the lender must go with witnesses[1] to the house of the debtor, and make a formal demand of the money due[2]; if it were not paid, or returned before the sun's going down, the creditor, after an interval of seven nights, was to make a second demand; if that also were unsuccessful, he had to make a third, after allowing a similar interval to elapse; three solidi were added to the original debt for each refusal to pay; and if the debtor, on the third demand, also refused to pay, or to *pledge his faith* for the payment, besides the nine solidi above-mentioned, he became liable to a fine of thirteen solidi[3], which might be recovered at the *mallus* or ordinary county court.

As to things intrusted to the care of another.

If an animal were committed to the care of another, who received a reward for his care, and it died under his care, he was bound to replace it; but he was only bound to restore the hide if he had received no reward, and had taken reasonable care of it; so a person who borrowed an

[1] Who performed the same office as the summonitores of Glanville. Lib. i. c. 6. et seq.

[2] "Et sic in solem *collocet*." Leg. Sal. tit. 54. The same mode of computation by the *sun's going down*, was in use amongst the Jews. Exodus xxii. 26. Deuteronomy xxiv. 13.

[3] Leg. Sal. tit. 54. Rip. tit. 52.

animal from another, was only bound to take reasonable care of it, and was not liable to replace it in case it accidentally died [1]. If a thing borrowed were stolen, the borrower was allowed a stated time to discover the thief; if the thief were convicted, the lender received back the thing lent, or its value; the borrower from whom it was stolen, received the composition for the theft; if the thief were not found, the borrower was bound to restore half the value of the thing stolen [2].

Interest.

The practice of taking interest for money lent, though unknown to the Barbarians in their native countries [3], was pretty generally introduced amongst them at the time when their codes were compiled, though no rate of interest was settled, excepting amongst the Visigoths [4]. It was lawful for a man, on receiving a sum of

[1] Leg. Bavar. tit. 14. c. 1.

[2] Leg. Bavar. tit. 14. c. 4. § 1. 2. 3. 4.

[3] "Fœnus agitare, et in usuras extendere ignotum." Tac. de Mor. Germ. 26.

[4] The rate fixed by the law of the Visigoths was three siliquæ for one solidus; but the precise percentage cannot be stated, as the number of siliquæ to a denarius, and of denarii to a solidus, varied at different times. "Sed de solidis octo," the law proceeds, "nonum solidum creditori, qui pecuniam ad usuram dedit exsolvat," &c. Vis. v. 5. 4. and 8. So that the law of the Visigoths, which was confirmed at a council, permitted the practice of usury, though it was at this time universally condemned by the canons. V. Heinnec. Elem. Jur. Germ. lib. ii. § 378.

money, to bind himself by an oath, sworn on the altar or relics, before witnesses, to pay a certain sum for it daily, annually, or at any other stated periods; or to give double the sum at the end of a stipulated time; or to perform certain services for the lender. A minute was usually drawn up of such transactions, and the creditor was said to have pledged his faith; he might also bind himself to the same by an instrument in writing, signed and attested [1]. By the laws of the Franks, if a man pledged his faith to another, and made default in any of his payments, the creditor, after proving the transaction in the county court, was entitled to have the stipulated sum levied by the grave from the goods of the debtor [2]. The same practice prevailed amongst the Bavarians; but with them it was sufficient that the obligation were contracted by parol before witnesses *pulled by the ears*.

Any person was at liberty to receive a pledge for the payment of a debt, if *voluntarily* offered [3]; Pledge.

[1] See the forms of such obligations, Marculf. Form. lib. i. Form. 25. et seq. "Cautiones diversis modis factæ." Form. ed. Lindenb. 142. et seq. Form. 148. and 149. are releases of such obligations; and see Greg. Turon. iv. c. 47.; ibid. vii. c. 23.

[2] Leg. Sal. tit. 52. Rip. tit. 52.

[3] Leg. Alam. tit. 86. c. 2. So, "when thou dost lend thy brother any thing, thou shalt not go into his house to fetch his pledge. Thou shalt stand abroad, and the man to whom thou dost lend shall bring out

and land might be pledged for the payment of a debt by an instrument in writing[1]. It was unlawful amongst the Bavarians for a man, before judgment recovered, and amongst the Lombards before three unsuccessful applications, to take from his creditor any thing by way of pledge for what was due to him, without the creditor's consent, as the practice which had been introduced of creditors endeavouring to obtain, in default of payment, property of their debtors, as a pledge for payment of their debts, had been found to be productive of continual broils[2]. Various things among the Lombards were protected from being taken in pledge, under any circumstances, unless by the authority of a judge. Such were the war-horse, and cattle trained to the yoke; but if the debtor had no other property sufficient, then, on application made to a judge, these also might be taken in pledge[3]. Whatever laws in regard to contracts prevailed amongst the Anglo-Saxons depended wholly on custom.

the pledge abroad to thee." Deuteron. xxiv. 10. and 11. xxii. 16. and 17.

[1] V. Form. edit. Lindenb. 146. 147.

[2] Leg. Alam. tit. 86. Bavar. tit. 12. c. 1. and c. 3. § 3. Long. ii. 21. c. 1.

[3] Leg. Longob. ii. 21. 7. See to a similar effect, Cod. Just. viii. 17. 7. and 8.; and Deuteronomy, c. xxiv. 6.

CHAPTER XX.

OF WRONGS, PUBLIC AND PRIVATE.

WHEN the Barbarians compiled their codes, there were still but few offences that were considered worthy of death. The following is a catalogue of almost all the capital offences to be found in the codes. Conspiring against the life of the king[1]; desertion[2]; treachery, as the inviting an enemy into the country[3], the harbouring of spies, and raising a mutiny in the army[4]; incest[5]; the crime of parricide[6]; robbery, accompanied by any circumstances of atrocity[7]; setting fire to a house in the night-time[8]; stealing a man and

Public offences.

[1] Leg. Longob. i. 1. 1. Rip. tit. 69.

[2] Leg. Vis. ii. 1. 7. Longob. i. 1. 2.

[3] Leg. Longob. i. 1. 3. Alam. tit. 25.

[4] Leg. Longob. i. 1. § 4. 5. and 6. Alam. tit. 26.

[5] Leg. Rip. tit. 69.

[6] Ibid. Or even cursing a parent. Leg. Alf. § 15.

[7] Leg. Rip. tit. 79. Vis. vii. 2. 13. Leg. Inæ, § 12. Leg. Cnut. § 61.

[8] Leg. Sax. tit. 5. c. 2. et v. Leg. Fris. tit. 7.

selling him as a slave[1]; sacrificing to idols, and sorcery[2]. The Lombards inflicted the punishment of death on the man who deserted his companion in battle[3]. By the law of the Burgundians, and of the Anglo-Saxons under Alfred, murder was a capital offence[4]. Where the law inflicted the punishment of death, confiscation to the state of a portion of the property of the offender was in some nations annexed to it[5]; and amongst the Salic Francs, the house of a criminal capitally convicted was levelled with the ground[6]. The law of the Visigoths, in conformity with the custom of the ancient Germans[7], forbade the secretly putting to death of a convicted criminal: the execution was directed to take place in the face of the people at a public assembly[8].

Offences against the king and against the church.

In the law of the Lombards, some offences are mentioned which were considered as committed

[1] Leg. Alf. § 15.

[2] Ibid. § 30. and 32.

[3] Leg. Longob. i. 1. 6.

[4] Leg. Burg. tit. 2. c. 1. Childebert sanctioned the putting a murderer to death, if the relations of the deceased rather chose to take that revenge than accept the legal composition. Et V. Leg. Alf. § 13. 14.

[5] Leg. Longob. et Alaman. Sed. Vide ante, p. 398.

[6] Leg. Sal. tit. 71. This custom is noticed by Beaumanoir, as still prevalent in his time, p. 310. Bracton, (129 a.), and Lord Coke, (294 b.), mention the same custom as prevalent in England in early times, even for slighter offences.

[7] "Licet apud concilium accusare quoque et discrimen capitis intendere," &c. Tac. de Mor. Germ. c. 12.

[8] Leg. Vis. vii. 4. 7.

against the dignity of the king, and punished accordingly: such were the raising a tumult in a court of justice, or in a place where the king resided; for these and similar crimes the offender incurred a fine to the king of nine hundred solidi; and if the offender were unable to pay the penalty, he was liable to be disposed of at the pleasure of the king. Commotions excited in holy places were also visited with heavy pecuniary penalties, which were directed to be paid to the spiritual persons, to whom the place belonged [1].

Every unlawful act, from deliberate murder, down to the slightest injury to the person, and aspersion on character, was compensated by the payment of a settled composition, the amount of which in general varied according to the rank of the individual against whom the injury was committed [2]. The several injurious acts, which were considered to be such as to call for reparation, were defined, and an appropriate compensation affixed, with the most anxious minuteness, in order that in every case the judges might administer, not make, the law. This is particu-

Offences against individuals.

Pecuniary compositions.

[1] Leg. Long. i. tit. 2.

[2] The prevalence of this principle amongst the Anglo-Saxons may be seen in Wilkins's Anglo-Saxon Laws throughout, particularly p. 2. p. 3. p. 37. p. 39. and p. 40. This circumstance, and the greater relative weight given by the laws to the oaths of the higher orders of society, tends greatly to show that the inferior orders had little to do with the making of these laws:

larly observable in the codes of the Anglo-Saxons, of the Thuringians, Frisons, and Salic Francs. The compositions, which I am about to mention, were directed to be paid in *solidi*, *denarii*, or *saigæ*, and *tremissi*[1], which were the ordinary currency. If the offender had not sufficient money for the purpose, recourse was had to his moveable property; and the articles of which such property usually consisted are thus valued in the law of the Ripuarians: a sound ox, with horns, two solidi; a cow, one solidus; a horse, six solidi; a mare, three solidi; a sword, with a hilt, seven solidi; a blade, three solidi; a good coat of mail, twelve solidi; a helmet, with a crest, six solidi; a good pair of greaves, six solidi; a buckler and lance, two solidi; a trained hawk, twelve solidi; an untrained hawk, three solidi. Slaves were valued according to their accomplishments; a common slave was valued at thirty-six solidi. In default of moveables, the offender's land might be seized to satisfy the compositions to which he was liable[2].

Murder and homicide.

The composition[3] affixed for the murder[4] of a

[1] One solidus was equal to three *tremissi*; four *denarii*, or *saigæ*, made a *tremissus*. Alam. tit. 6.

[2] Leg Rip. tit. 36. and tit. 8. So "L'en doit penre les meubles avant que l'en li face grief de l'heretage." Beaumanoir, p. 283. et seq. V. ante, p. 86.

[3] This part of the laws of the Barbarians was entirely their own. "Quia in homine libero nulla corporis æstimatio fieri potest." Digest. ix. 3. 1. § 5.

[4] Leg. Rip. tit. 36 and 46. Leg. Sal. tit. 43. 44. 45. and 58. The term murder is here

bishop was 900 solidi; the value of other ecclesiastics depended on the spiritual dignities which they enjoyed. The amount to be paid on the murder of the various dignitaries in the state[1], and of men, women, of slaves, and freed slaves, in the various classes of society, descended in regular gradations, as has already been noticed under their respective titles. So much of the composition as remained, after deducting the fredum or fine to the king, which will be subsequently mentioned, constituted the *weregild* of the individual. Weregild.

The crime of murder was aggravated, and by consequence the composition increased, if it were committed secretly, in the house of the person murdered, while he was asleep, or at a feast, or if the body were attempted to be concealed, as by being thrown into a well[2]: and the coward who murdered a boy under twelve years of age was compelled to pay to his relations 600 solidi[3]. Sixty-two solidi were fixed as the composition for an attempt to murder[4]. The giver, carrier, and receiver of a sum destined as the inducement for the murder of another, were each compelled to pay

used in its present acceptation.

[1] A *litus*, or freedman, who murdered a nobleman, might, by the Saxon law, be put to death by the relations, together with seven of his kindred. Leg. Sax. tit. 2. § 5.

[2] Leg. Long. i. 9. 3. Sal. tit. 43. § 2. Ibid. 44. § 1. and 2. Alam. tit. 49. Et v. Greg. Turon. lib. vii. c. 23.

[3] Leg. Sal. 26. § 1.

[4] Ibid. 19. § 1.

the like sum [1]. Amongst the Ripuarians, if a man were killed by an animal, the relations could only claim the half of the weregild, or value of the person killed, from the owner, and they took the beast as the other half [2]: if the death were occasioned accidentally by any manufactured article, the weregild could not be claimed unless the owner afterwards made use of it [3]. A curious law occurs in the code of the Alemans as to death occasioned by animals: when a dog killed a man, the owner was bound to pay one half of the weregild, and if the person entitled to revenge should demand the other half, he might obtain it on the following terms:—He must shut up all the doors of his house but one; over this, at the distance of nine feet from the ground, the dog was to be hung and suffered to putrify, and when putrified, to drop, and the bones were to lie there, and the owner of the house was to go out and in by no other door; if he removed the dog, or the putrid bones, he was compelled to return one half of the weregild [4].

Respect paid to the bodies of dead persons.

A heavy composition was directed to be paid to the relations of the deceased by those who offered any species of indignity to a dead body: he who

[1] Leg. Sal. tit. 30.
[2] Leg. Rip. 46. § 1.
[3] Ibid. tit. 70. § 1.
[4] Leg. Alam. tit. 99. c. 22. In Leg. Long. i. 9. 24. is a curious decision as to the composition to be paid for the death of a person who incautiously stood at the brink of a well, and was killed by the bucket falling on his head.

took a body from the earth, or despoiled it of its shroud, was obliged to pay the relatives 600 solidi, and was expelled the society of men, till it was satisfied [1]. This respect for the dead was carried to a surprising extent by the Bavarians: if eagles or other birds were, as the law declared it often happened, tearing to pieces a dead body, and a man let fly an arrow at the birds, and by accident wounded the body even in the slightest manner, he was bound to pay a composition of twelve solidi [2].

Bodily injuries.

Every violence that could be offered, from a bloodless blow with the fist or a stick, through the progressive stages of fetching blood, cutting [3], stabbing, breaking bones, and maiming or destroying limbs and members, all of which were distinguished in their different possible variations with the most curious minuteness, had a proportionate composition affixed to them, rising from three solidi to 200 [4]. If three or more bones were beaten out of a man's head, or other part of his body, the following method was adopted by the

[1] Leg. Sal. tit. 17. tit. 57. § 5. Et v. Alam. tit. 50. Amongst the Romans this offence was severely punished. "Sepulchri violati actio *infamiam* irrogat." Dig. xlvii. 11. 1. and v. ibid. l. 11. "Si corpora ipsa extraxerint, humiliores quidem fortunæ summo supplicio adficiuntur, honestiores in insulam deportantur."

[2] Leg. Bavar. tit. 18. c. 4. and 5.

[3] Leg. Alam. tit. 65. § 6.

[4] Leg. Sal. tit. 19. 31. Rip. tit. 1. 2. 3. 4. 68. &c.

Ripuarians, Alemans, Lombards, and Frisons, to determine the amount of the composition to be paid: a shield was placed in the highway, the bones were cast on it from the distance of twelve feet, and if three of them could be heard to fall on the shield at that distance, thirty-six solidi were to be paid; and for every other *sounding* bone one solidus was added to the above composition [1].

Defamation, &c.

Every kind of abuse and defamation had also a proportionate composition: he who accused an innocent man in his absence to the king, of any crime of inferior magnitude, was bound to pay to the individual sixty-two solidi, but if the crime imputed carried death, the composition was 200 solidi [2]. Among the Bavarians the malicious accuser was condemned to the punishment attached to the crime he had wrongfully imputed [3]. The composition for calling another a dirty fellow, a liar, or a spy, was fifteen solidi; and originally the same composition was due from the man who unjustly accused another of having run away and left his shield with the enemy; but Charlemagne

[1] Leg. Rip. tit. 68. Fris. tit. 22. c. 70. Addit. Leg. Fris. tit. 3. c. 24. Leg. Long. l. 7. c. 3. By the law of the Alemans, the bone was to be cast from the distance of 24 feet. Leg. Alam. tit. 59. § 4.

[2] Leg. Sal. tit. 20.; 60 sol. Rip. tit. 38.

[3] Leg. Bavar. tit. 8. c. 17. Simil. Leg. Vis. vii. l. 1.; this became the law in a great part of France. Beaumanoir, p. 315.

reduced the composition to three solidi[1]. If a man charged with any crime confessed his guilt, the penalty was in most cases mitigated[2].

Robbery and theft were visited with severe penalties in all the Barbarian nations, but how ineffectual they were, the constant repetition sufficiently proves. The receivers of stolen goods, and those who knowingly concealed a thief, or gave him the smallest assistance, were punished as the thief himself[3]; as also was the person who compounded with the culprit[4]. By the Salic law, the thief was in ordinary cases compelled to restore to the owner the thing stolen, or the value, and all expenses[5] attendant on the recovery of it, and to pay, by way of fine, a sum proportioned to the value of the thing stolen[6]. If a lock were broken open, or key forged, the com- Robbery and theft.

[1] Leg. Sal. tit. 32.

[2] Leg. Ripuar. tit. 54. Sal. tit. 10. § 3.

[3] Leg. Rip. tit. 78. Burgund. tit. 16. Bavar. tit. 8. c. 14. § 1. and 4.

[4] Leg. Burg. tit. 71. Bavar. tit. 8. c. 15. Decret. Clot. § 11. This was adopted from the Roman law. Dig. xlvii. 2. 1. 50. Ibid. tit. 16.

[5] "Delatura," see Hist. Franc. tom. iv. p. 226, note 1. The Salic law, Edit. Herold. tit. 76. fixes the amount of *costs* to be paid by the murderer of a freeman at seventy solidi; of a boy or freedman, at fifteen solidi; and by a thief, at seven solidi.

[6] Leg. Sal. tit. 2. 3. and 4. By the law of the Visigoths, the thief, if a freeman, was bound to restore nine-fold; if a slave, six-fold; besides which, each received one hundred stripes. Vis. vii. 2. 13.

position was increased[1]. By the law of the Bavarians, the thief was compelled to restore to the person wronged nine times the value of the thing stolen[2]. If a man killed the house dog of another after sun-set, it was considered as done with an intent to steal; and therefore a treble composition was affixed to the offence[3]. The person who seized a thief was bound, by the law of the Visigoths, to bring the offender to justice within a day and a night after he was taken[4].

Incendiaries. Incendiaries were, with the Lombards, obliged to restore three times the value of the things burnt, according as they were estimated by persons called in for the purpose, from the neighbourhood. The Salic law compelled an incendiary to return the value of every thing burnt, and to pay a fine of 62 solidi to the owner of the house, and the same sum to all who were within the house and escaped alive. If any one were burnt to death, his full weregild was to be paid to his relations[5]. The laws of the Anglo-Saxons in regard to wrongs, which very nearly agree with those which are above detailed, are concisely stated in Mr. Lin-

[1] Leg. Sal. tit. 7. c. 3. tit. 12. § 5.

[2] Leg. Bavar. tit. 8. c. 1.; and see Exodus, c. xx. v. 1.

[3] Leg. Bavar. tit. 19. § 9. tit. 1. c. 6. § 2.

[4] Leg. Vis. vii. 2. 22.

[5] Leg. Long. i. 19. 1., Sal. tit. 18. § 1. Sax. tit. 5. § 2. See also Fris. tit. 7.

gard's 1st Appendix, to which it may be sufficient to refer.

Such of the compositions above described as were paid in satisfaction of injuries attended with such circumstances as to put an affront upon the party injured, were made up of three distinct payments, namely, 1st, a satisfaction for the damage sustained [1]; 2d, a satisfaction for the faida or enmity excited [2]; and 3d, of a sum paid by way of fine to the king, which in most of the codes is called the *fredum*, in the Anglo-Saxon, the *wite* [3].

The satisfaction for the species of animosity called *faida*, which I now proceed to explain, is expressly mentioned in several of the codes [4]; but

The faida or satisfaction for feuds excited between individuals or families.

[1] See particularly Leg. Longob. i. 31.

[2] Montesquieu, by quoting Leg. Long. i. 9. 17. to support what is stated by him (Esprit des Lois, liv. xxx. c. 20.) concerning the *fredum*, shows that he has confounded the *faida* with the *fredum*; Mons. Hervé (Theorie des Matières Feodales et Cens. to. i. p. 231. and 235.) and other more modern writers have followed Montesquieu; but the authorities cited in this and the succeeding section, and indeed the quotations of Mons. Hervé, p. 222. note 2. seem to me plainly to show that these learned and sagacious persons have here fallen into an error.

[3] Leg. Æthelb. § 9. &c.

[4] See particularly Leg. Long. i. 7. 1. "Faida, id est inimicitia." Ibid. tit. 37. l. 1. and 15." Ib. i. 9. 18. Leg. Bavar. tit. 2. c. 8. Leg. Fris. tit. 2. c. 5. tit. 3. c. 4. Leg. Sax. tit. 4. § 7. The custom of exacting a satisfaction for the faida may also be recognized in Gregory of Tours, lib. vii. c. 47. et v. Baluze, to. ii. p. 942. This enmity, in

the notions of the Barbarians, in respect to feuds between individuals or families, from which this payment originated, are principally to be collected from the code of the Lombards.

According to the early customs of the Lombards, when an offence was committed which assailed the honour of the injured person, and therefore gave rise to a feud [1], besides the sum given by way of compensation for the damage done, a *separate sum* was allowed to the injured person, as a satisfaction for the enmity which was raised [2], which fine, when it is noticed in the codes, is called the *faida*. Rotheris, king of the Lombards, augmented the compositions to be paid for those offences which raised a feud, by adding to the amount to be paid by way of *compensation* a certain sum to be paid in consideration of the animosity raised, which he compelled the party to accept, and the two sums thus consolidated obtained from this time the common name of the composition [3]. Yet in some cases the ancient custom was continued: thus

the Anglo-Saxon laws, is denominated *fæthe*. Leg. Eadm. § 1.

[1] Such as wilful murder, infliction of wounds or blows, marriage of the spouse of another, and the like. Leg. Longob. i. 7. 1. Ib. i. 9. 18. 1. 37. 1. Ib. ii. 2. 1. and 2. Simple *theft*, as it did not assail the honour of the injured person, was not considered as an affront, and therefore did not give rise to a *faida*.

[2] Leg. Longob. 1. 7. 1. and 15. See to the same effect, Leg. Sax. tit. 12.

[3] Vide Leg. Longob. locis jam citatis.

he who married a woman without the consent of her relations, or who had been espoused to another, paid, not only 20 solidi by way of composition, but also another 20 solidi as a satisfaction for the *faida* which was excited by the affront put upon relations [1]. If a man killed another by accident, nothing by way of *faida* could be required [2], as the relations in that case had received no affront. This distinction between the compensation given for the damage sustained, and the faida excited by the act of violence, is also to be traced in the codes of the Saxons and of the Frisons: in the latter nation it would appear, that at the time when their code was compiled, the appeasing of the *faida* was still left to the private agreement between the parties [3].

As women could not avenge an insult, they were not entitled to receive any compensation by way of faida; therefore, though women, by the law of the Lombards, were allowed to share in the succession of a deceased person, they were not entitled to receive any part of the composition paid for the murder of a relation, but the whole was given to the kindred of the male sex [4].

[1] Leg. Long. ii. 2. 1. 2. and 3.

[2] "Si quis hominem liberum casu faciente nolendo occiderit, componat sicut appretiatus fuerit, et *faida* non requiratur eo quod nolendo occiderit." Long. i. 9. 17. Leg. Saxon. tit. 12.

[3] Leg. Frison. tit. 2. § 1. and 3.

[4] Leg. Long. i. 9. 18.

Of the fredum or wite.

Among the fierce ancestors of the Barbarians, every injury that was committed, by the enmity which it raised, tended to expel all order from the community; it was therefore a crime against the king, or chief. Accordingly, from the earliest times, the offender, besides the composition due to the injured party, was compelled to satisfy by gifts the resentment of the chief of his tribe. Hence originated the payment of the fredum, mentioned in the codes [1]. The fredum, then, was a fine paid by the offender to the king, or chief of the state, in recompense of the animosity of the chief of his community, excited against him by his having, contrary to right, committed an act leading to consequences prejudicial to the society at large [2]. All the codes inflict penalties on those who com-

[1] "Sed et levioribus delictis pro modo pœnarum, equorum pecorumque numero convicti multantur, pars multæ *regi* vel *civitati*, pars ipsi qui vindicatur vel propinquis ejus exsolvitur." Tac. de Mor. Germ. c. 12. 21. and 22.

[2] Montesquieu defines the fredum to be "la recompense de la protection accordée contre le droit de vengeance." Esprit des Lois, liv. xxx. c. 20.; which definition is adopted by Dr. Robertson, Hist. of Charles V. vol. i. p. 361. et seq. and others; but that the definition in the text is correct, is, I think, evident from the following law in the code of the Alemans: "Si autem vi abstraxerit, et injuriam ecclesiæ fecerit, componat 18 sol. ad ecclesiam, et *fredum* solvat ad fiscum 60 sol. *quia contra legem fecit.*" Leg. Alam. tit. 3. c. 3. Gregory of Tours also, in Vit. Beat. Martini, denominates the *fredum* "*compositionem* fisco debitam." See also Dr. G. Stuart's View of the State of Europe, 4to. p. 256.

mitted any such offence, but not universally by the name of fredum. In the code of the Lombards, the offences for which the fredum was payable, and the amount to be demanded, were in general particularly specified in distinct and separate laws [1]. According to the other codes, it was declared generally, that if a man were convicted of robbery, or any other unlawful act, accompanied by violence [2], a fine, by way of *fredum*, should be paid to the king. Some of the codes declared that a fredum should be payable for particular offences, which were not comprehended under this general description: thus, for knowingly buying stolen goods [3], refusing to pay a debt legally contracted and proved [4], and taking a pledge from another contrary to law [5].

In some of the codes, the amount to be levied by way of *fredum* for each offence was particularly

[1] See particularly Leg. Longob. ii. tit. 1.

[2] Leg. Fris. tit. 3. 3. and 6. Addit. tit. 10. Thuring. tit. 7. § 2. 3. and 5. Ibid. tit. 8. Leg. Sax. tit. 4. § 7. Ripuar. tit. 46. § 1. tit. 70. § 1. Bavar. tit. 1. c. 6. § 3. Ibid. c. 7. and 10. Alam. tit. 3. § 2. and tit. 32. Leg. Sal. tit. 14. § 5. tit. 26. § 9. and tit. 56. Decret. Clot. § 12.—It is remarkable that amongst the Bavarians and Alemans, no *fredum* was payable by a *murderer*. This may account for the amount of the composition for the murder of a freeman amongst the Francs, by whose law a fredum was exacted from the murderer, being 200 solidi, whilst amongst the other Barbarians it was 160 solidi only.

[3] Leg. Bavar. tit. 8. c. 13. § 2.

[4] Leg. Sal. tit. 52. § 2.

[5] Leg. Bavar. tit. 12. c. 3.

specified by the laws; but among the Francs, the sum levied for the *fredum* was always a certain proportion of the composition directed to be paid on conviction of the offender. The whole composition was received by the party aggrieved, who was bound to deliver over the fredum to the grave or to the judges of the court where the offender was convicted [1]. It is probable that the count and the judges reserved some portion of it for themselves [2]. When an unlawful act was committed unintentionally, or by accident, the fredum was not levied [3].

According to the codes of the Saxons and Frisons, the *faidosus*, or person who, by an unlawful act, had excited a feud, if he persisted in refusing to pay the legal composition, might be killed by the person injured, in any place excepting in his own house, or in a sanctuary, or in going to or returning from the county court [4]. But a man bred up to arms would not tamely submit to his punishment, especially if he had a number of vassals at his command; the accuser, therefore, had to conquer before he could avenge;

[1] Leg. Rip. tit. 89. Sal. tit. 52. § 2. Decret. Childeb. § 12.

[2] Decret. Childeb. ubi sup.; and see Dr. Gilbert Stuart's View of the State of Europe, p. 256.

[3] Leg. Rip. tit. 46. and 70. Sal. tit. 35.

[4] Leg. Sax. tit. 3. § 4. Leg. Fris. addit. Sapient. tit. 1.

and as this was found to be productive of serious disturbances, the Ripuarians required the parties, in such cases, to proceed to a regular combat, according to the forms prescribed by the law [1].

The bannus was a fine similar in its nature to the fredum. The man who, when called out on military service, committed an offence which raised a disturbance in the army, paid to the party nine times the composition attached to the offence, if committed during peace; and to the king nine times the amount of the fredum: this fine was called the *Bannus* [2]. A similar fine was due by those who refused to join the army [3]. Amongst the Anglo-Saxons, this fine or mulct was called the *firdwite*, which Dr. Lingard considers, and with reason, to have given rise to the payment called *scutage*, which prevailed under the Normans [4]. The Bannus was also due from those who were convicted of committing any outrage or violence in the country by means of an armed force [5].

Bannus.

Firdwite.

[1] Leg. Ripuar. tit. 32. § 4. and see Lingard's England, i. p. 499.

[2] Leg. Frison. tit. 17. Simil. Long. i. 14. l. 1. 2. 3. and 4.

[3] Leg. Ripuar. tit. 65. Greg. Turon. lib. v. c. 26.

[4] Lingard, vol. i. p. 465.

[5] Leg. Thuring. tit. 10. § 9.

CHAPTER XXI.

MISCELLANEOUS LAWS OF THE BARBARIANS.

I SHALL close this outline of the laws of the Barbarians by noticing some miscellaneous laws, which could not be conveniently introduced in the preceding sections, but which materially tend to explain the state of society amongst them: such were their laws relating to vills, to hospitality, to hunting, and to agriculture.

Regulations as to vills.

It was a law with the Salians, that no one could lawfully become an inhabitant of a vill other than that to which he was attached by birth, without the consent of every individual of the prior inhabitants; if, therefore, any person, after notice had been given him to depart, persisted in residing for thirty nights in a vill to which he did not belong, the grave, on application being made to him by any one of the inhabitants, was bound to expel the intruder, and to levy from him thirty solidi; he also forfeited to the inhabitants all the erections he had made during his stay. However,

if a man resided in a vill for twelve months without any objection being made, he thereby became in every respect an inhabitant [1].

Hospitality was a prominent feature of the Barbarian character [2]. Hence it was found necessary to forbid, under very severe penalties, the affording food and covering to those who were convicted of heinous offences, and had thereby forfeited the protection of the law [3]. Travellers were amply protected, and were allowed to rest, for any time not exceeding two days, on uninclosed lands, and to feed their beasts there: they might also take from the neighbouring woods leaves for fodder, and boughs for firing, taking care, however, not to destroy the trees [4]. Hospitality.

The exercises of hunting, hawking, and fishing, were protected and encouraged by the laws. He who killed or concealed a stag or a boar that had been hunted down by the dogs of another man, Hunting.

[1] Leg. Sal. tit. 47.

[2] "Hospites—sanctos habent." Cæs. de Bello Gall. vi. c. 21. "Quemcunque mortalium arcere tecto nefas habetur." Tac. de Mor. Germ. c. 21. So, "quicumque hospiti venienti tectum aut focum negaverit, 3 sol. inlatione mulctetur." Leg. Burg. tit. 38. c. 1. 2, &c. Simil. Bavar. tit. 3. c. 14. § 1.

[3] Leg. Sal. tit. 57. § 5. &c. The regulations to be found in Bracton (116. a.) to prevent the harbouring of suspected persons, are very similar, and may be traced to a similar origin.

[4] Leg. Vis. viii. 4. 27. Long. iii. 4. 1. This privilege of travellers is recognised in the Book of Feuds, ii. 27. 1. ult.

was fined fifteen solidi [1]. However, a man who set spring bows, or other instruments, for killing wild beasts, was bound to give public notice that they were set, and to designate the place by certain marks, under the pain of answering for all the damage which might be occasioned by such instruments [2]. The Anglo-Saxon laws prohibited the exportation of horses [3].

Agriculture.

The interests of agriculture and farming in general were also protected by the laws [4]. A bull *(taurus gregem regnans)* which presided over three herds belonging to three separate vills, was guarded from being stolen by a composition of forty-five solidi; if he presided over one herd only by thirty-five solidi [5]. To prevent mischievous persons from stealing the bells from the necks of animals feeding on uninclosed lands, it was found necessary to annex to the offence rather severe penalties [6]. And in the Burgundian code, there is a law by which, in case any freeman tied bones, logs of wood, or other *scandala*, to horses'

[1] Leg. Sal. tit. 35. Longob. i. 22. 5.

[2] Leg. Burg. tit. 46. Et V. Dig. ix. 2. 28.

[3] Wilkins, Leg. Anglo-Sax. p. 59.

[4] Leg. Vis. lib. viii. tit. 3. 4. and 5.

[5] Leg. Sal. tit. 3. c. 7. and 8. See also Alam. tit. 75.

[6] "Si quis tintinnum de porcina furaverit, 15 sol. culp. judicetur." Leg. Sal. tit. 29. § 1. and 2. Et v. Vis. vii. 2. 11.

tails, in order to frighten them, he was bound, if any accident occurred to the horse, to give to the owner two horses of equal value. A slave, for the same offence, received two hundred stripes, and became the property of the owner of the horse [1]. Injuries done to hedges, ditches, meadows, and vineyards, and their produce, were to be made good by the aggressor, besides which he was bound to pay a settled fine. The man who found a beast in his corn was not at liberty to injure it: if he did, and confessed his fault, he was bound only to restore another beast to the owner; but if he denied the fact, and was convicted at law, he was bound to pay fifteen solidi, besides restoring the beast [2]. If the finder impounded the beast, as he was at liberty to do, he was bound to give public notice of his having done so, that the owner might be enabled to take it away, and pay for the damage done [3]. If the beast of one man injured or killed that of another, the parties exchanged; the owner of the beast that did the injury making up the excess of the original value of the beast injured,

[1] Leg. Burg. tit. 73.

[2] Beaumanoir, p. 276, notices a similar law as prevalent in his time. Indeed, almost all the laws mentioned in this chapter are to be found in the Coutumes des Beauvoisins, c. 52. et seq.

[3] Vide Leg. Sal. tit. 10. 36. &c. Vis. viii. 3. 2. viii. 5. 6. xii. 13. 14. Longob. i. 23. § 1.

if there were grounds for it [1]. By the Lombard law the proprietor was answerable for the acts of the farmer to whom he let his lands [2].

[1] Beg. Rip. tit. 46. [2] Long. i. 9. 22.

CHAPTER XXII

COURTS OF JUSTICE—PRESIDENTS AND JUDGES.

Amongst the continental Barbarians.

UNTIL the establishment of the separate jurisdictions, which I have before adverted to, it was the general law throughout each of the Barbarian kingdoms, that every man residing within the districts over which the count presided, excepting the tenants of the royal domains, was subject to the jurisdiction of the court of the count, the viscount, or the centenary [1].

Themallus, or county court of the Francs.

The *màllus*, or ordinary county court, was held once a fortnight in some nations, in others less frequently [2], in the open air, under some particular tree, or in some well known place [3].

[1] V. ante, p. 303. 305.

[2] "Ut placita fiant per Kalendas, aut post 15 dies, si necesse est, ad causas inquirendas. Comes vero secum habeat judicem," &c. Leg. Bavar. et Alam. ubi sup. Rip. tit. 50. Vis. ii. 1. 23.

[3] Heinnecc. Elem. Jur. Germ. lib. iii. § 21. Charle-

In the time of Louis the Pious, the count was not bound to hold the mallus more frequently than three times a year; but at this time royal missi or justices were sent into each county to determine lawsuits, which rendered it unnecessary that the ordinary county courts should be held more frequently[1].

Judges.

Although a count, viscount, centenary, or an officer appointed by the king, presided in the various judicial tribunals within the empire of the Francs, the question between the parties in each cause was decided, and the judgment given, by *sagibarones, scabini,* or *assessors*[2], chosen by the people[3] who appear to have been the only persons, besides the vassals of the count, and those per-

magne directed that it should be held under cover.

[1] Baluze, to. i. p. 616; ibid. p. 644. A. D. 824.; ibid. to. ii. p. 68.

[2] "Præcipiente comite *scabinis judicantibus.*" Lindenbr. Gloss. voce Scabinus; et V. Leg. Bavar. ii. c. 15. § 2.; ibid. c. 17. Alam. tit. 41. Long. ii. 47. 1. Capit. lib. iii. c. 56. The assessors are called indiscriminately sagibarones, rachinburgii, and scabini, Leg. Sal. 56. § 2. &c.; ib. tit. 52. and 59. Leg. Rip. tit. 32. § 2.; ib. tit. 55. Longob. i. 35. 1. 2. &c. Beaumanoir calls the assessors, who still performed the same duties, *sages gens*, cap. i. p. 11. The centeni singulis ex plebe comites, mentioned by Tacitus, de Mor. Germ. c. 12. exercised similar functions.

[3] That the scabini were chosen by the people, at least, in the time of Charlemagne and his successors appears from Baluze, to. i. p. 467. A. D. 809. and Capit. lib. vii. § 309.

sons who were summoned as parties and witnesses[1], who were bound to attend the county court in the time of Charlemagne.

The number of assessors necessary to be present at the mallus varied in different nations, indeed in the same nation, according to the nature of the proceedings. Amongst the Ripuarians, three only were necessary in order to impose the legal fine of fifteen solidi on a defendant in default of his appearance; but in order to warrant the greve to levy the fine, called the *strudis*; that is, fifteen solidi to each of the seven assessors, and forty-five solidi to the plaintiff, seven assessors were required to be present with the greve, to receive the plaintiff's oath, that he had seven times summoned the defendant to appear without effect. Among the Salians, three were sufficient to determine any cause; but the count or greve, on making a distress, must always be accompanied by seven[2]. The life of an assessor, if a freeman born (ingenuus), was of equal value with that of an antrustion[3].

[1] Baluze, to. i. p. 394. § 20.; ib. p. 466. Sed vide p. 616. from which it appears that the general obligation on the part of all freemen was afterwards revived.

[2] Leg. Rip. 32. § 1. 2. 3. Sal. 56. § 2. 52. § 2. Charlemagne directed that there should be seven at the least. Long. ii. 42. 2. The law of the Alemans required one judex only. Alam. tit. 41.

[3] Leg. Sal. 56. § 1. 2. Leg. Rip. tit. 53. gives the same value to a *greve*.

The count, and also the judges or assessors, were bound to have with them the written code, and to decide according to the law therein contained [1]. The Ripuarian law permitted that every one against whom a cause was instituted should be judged according to the law of the nation to which he belonged [2]; and similar regulations prevailed amongst the Anglo-Saxons, in respect of the *merchenelage*, *west-saxonelage*, and *danelage* [3].

Amongst the Goths.

Judicial authority among the Goths, as already mentioned, was executed by various officers, having regular gradations of rank, from the duke or chief of a province to the decanus (tithing-man), or chief of its smallest subdivision [4]. These were the regular judges; they were appointed by the king, who might also appoint judges for hearing any particular cause; the parties also might elect a

[1] "Judex autem talis ordinetur, qui veritatem secundum *hoc edictum* judicet." Leg. Bavar. tit. 2. c. 17.; ibid. tit. 2. c. 15. § 1. and 3. Prol. Leg. Burg. Leg. Sal. tit. 60. Gregory of Tours, lib. vii. c. 47. *reports a case*, from which it appears that the assessors considered themselves sometimes at liberty to decide according to *equity*, though against the *law*.

[2] Leg. Rip. tit. 31. § 3. 4. &c.; also tit. 55. The disputed titles, 44. and 60. of the Salic law, would imply the same right, unless the defendant solicited to be tried by the Salic law. See Esprit des Lois, liv. 28. c. 4. Gibbon, c. 38. note 71.

[3] See Heywood on Ranks, Introduction, p. xxvii. to xl.

[4] There is a great similarity between the authority of the several judges mentioned in the laws of the Visigoths and Deuteronomy, chap. i. 15. 16. 17. &c.

judge for themselves; but though the Goths had no regular assessors [1], the judges, following as it would appear the institutions of the Romans, were in the habit, when they saw occasion, of calling in the assistance of skilful persons to enable them to form their judgment [2].

Amongst the Lombards, there was a judge, denominated the sculdais, whose authority was subordinate to that of the scabinus or assessor, and before whom causes of minor importance were determined, saving the right of appeal to the assessor [3]. The judges in most of the Barbarian nations were entitled to receive a certain part of the composition recovered by the complainant in each cause [4]. Lombards.

Amongst the Anglo-Saxons, the principal courts of justice were the schyre motes and hundred motes. The *schyre mote*, which was the general assembly of the county, and at which all the owners of land, excepting the king's thanes, were bound to attend [5], was held twice a year at the least; the *hundred mote* was held once a month [6] at the least, in each Courts of justice amongst the Anglo-Saxons.

[1] Leg. Vis. ii. 1. 26. 29. 30.; ii. 1. 14.

[2] Leg. Vis. ii. 2. 2. Cassiodor. Var. lib. vi. c. 5.

[3] Long. i. 14. 7.; ib. lib. ii. tit. 41. and 43.

[4] Leg. Vis. ii. 1. 18. 25. Amongst the Bavarians, the judge took the ninth of the composition. Bavar. 2. § 16. et V. Præf. Leg. Burg.

[5] See the writ of Hen. I. in Rymer's Fœdera, to. i. p. 12. and other authorities cited. Edin. Rev. No. 69. p. 29-30.

[6] Leg. Eadw. § 11. Wilkins.

hundred or wapentake. If circumstances required it, these assemblies might be convened more frequently; and it was in the power of the bishop, earl, or gerefa or sheriff, to convene extraordinary assemblies of two or more hundreds if he thought proper. The bishop and the earl, or in his absence the gerefa, and sometimes both the earl and gerefa, presided at the schyre mote; the gerefa usually alone presided at the mote of the hundred. In the cities and towns which were not within any peculiar jurisdiction, there was held, at regular stated intervals, a *burgh mote* for the administering of justice, at which a gerefa, or a magistrate appointed by the king, presided [1]. Besides these courts there was an inferior court, for the trial of trifling causes, and the enforcing the regulations in regard to free pledges, called the court of the *decennary*, or tithing, which was also held before a magistrate appointed by the king, whose duties and office were similar to that of the gerefa [2].

The Anglo-Saxon monarchs appear to have all along exercised, by means of envoys or magistrates appointed for that purpose, an inde-

p. 50. et V. Leg. Edovardi; ibid. p. 205.

[1] Leg. Eadw. Wilkins, p. 80. The *Court of Hustings*, in London, was held once a week. Leg. Edovard. p. 206.

[2] V. Leg. Cnut. § 14. Bromton, p. 924. Ingulph. p. 875. &c. *ante*, p. 306.

pendent jurisdiction over the inhabitants of their own domains; and in imitation possibly of the continental sovereigns, they frequently, as I have before observed, granted to certain favoured individuals portions of the royal domains together with the same exclusive jurisdiction over the inhabitants of the lands so granted, as the crown itself had enjoyed. In process of time also, in England as in France, grants were made by the kings to great landed proprietors, of exclusive jurisdiction over their own lands, though such lands might never have formed part of the royal domains. These grants, in the time of Edward the Confessor, appear to have descended with the land, and to have been irrevocable.

Courts of the royal vassals.

The privileges so conferred were comprised under the denomination of *sac* and *soc*, *thol* and *theam*, *infangthef* and *utfangthef*, and other barbarous expressions; and the thanes to whom they were granted were known by some title equivalent to lord[1]: and to me it appears highly probable, as I shall have occasion again to mention when treating of the members of the Wittenagemot, that it was the enjoyment of one of these local

[1] Leg. Edovard. § 26. Wilkins, p. 202. Leg. Hen. I. § 20.; ibid. p. 246. Domesday, passim. In the time of Henry I. the vavasors, or vassals of the king's tenants in capite, also had their peculiar jurisdictions, imperium in imperio. Leg. Hen. I. § 27. Wilk. p. 249. *Hlaford* was the original term given to the lords who held of the king.

lordships under the crown, that constituted a man one of the *proceres* of the nation. The lords who claimed to have these privileges were bound to hold in their hall [1], at regular intervals, a mote, for the administration of justice to the persons residing within their jurisdiction. The constitution of the court of *halmote*, and the mode of proceeding there, was the same as at the schyre mote, hundred mote, and burg mote, which I am about to describe, excepting that the assessors or judges would not be above the rank of ceorls [2]; whereas no one could act as judge or assessor in the court of the shire or of the hundred, unless he held the rank of thane [3]: in early times it would appear

[1] The halls of different lords are frequently mentioned in Domesday. See particularly under Lincolnshire, &c.

[2] The following passage in the eighth section of the laws of Henry I., which is entitled de Hundretis tenendis, appears to have relation to the description of persons whom each lord (hlaford) was to have as *judges* at his hallmote. "Et omnis dominus secum tales habeat qui ei justiciabiles sint, tanquam eos, si peccaverint, ad rectum habiturus, vel pro eis forsitan rationem habiturus."

[3] "Regis judices sunt *barones comitatûs*, qui liberas in eis terras habentes, per quos debent causæ singulorum alterna prosecutione tractari, *villani* vero et *cocseti*, vel *pardingi*, vel qui sunt hujusmodi viles vel inopes personæ, non sint inter legum judices numerandi." Leg. Hen. I. § 29. Leg. Cnut, § 14. Wilkins, p. 135. "Quo mortuo beatus Ædelwildus et Ægelevinus, cognomento *alderman* ac *primates* Northamtonensis provinciæ, nec non orientalium Anglorum *proceres*, *placitum habuerunt* apud Walmesford in 8. hundretis. Ubi, inter alia, judi-

that no one could act in this capacity even though he held the rank of thane, unless by summons or appointment from the king [1].

In the schyre mote, the duty of the bishop and of the earl, or his deputy, and in the hundred mote, and burg mote, the duty of the ealdorman, gerefa, or other president, was only to explain the law [2], and to see that the judgment of the court Presidents.

catum est, ut Silfrid relicta Leffii et hæredes sui Deo et episcopo prædictam rapinam emendare deberent, sicuti ipse si vixisset facere debuisset; appretiaverunt summum damni quod episcopo intulerat, quisquam 100 libras." Hist. Eliens. c. xi. Gale, p. 469: et v. ib. c. x. "Diu antequam Ædelwoldus episcopus apud Ely monachos, coadunasset, venit Ulstanus de Dalham, et cum eo *barones quamplurimi*, illic ibique collectis duobus hundretis versus aquilonem, ad ostium monasterii placitum habuit." Hist. Eliens. c. xxvii. p. 475. In some passages of the same history the judges are denominated *concionatores*. In some places we read of *meliores concionatores comitatus*. Hist. Eliens. c. xlv. p. 484. And this term is applied in the next chapter, xlvi. to the members of the great council of the nation.

[1] I collect this from the passage in the Saxon Chronicle, which states that Wihtred, king of Kent, in the year 694, said to the archbishop of Canterbury, and other nobles of the land then assembled, "Regum est constituere comites, duces, vicecomites, et *judices* (domesmen). Archiepiscopi est Dei ecclesiam gubernare eique consulere, episcopos item, et abbates, et abbatissas, et presbyteros et diaconos eligere et constituere." Domesman appears to be here used in the same sense as *deman*, or *world deman*. Wilkins, p. 149. &c.

[2] "Interesse comitatui debent episcopi, comites, et ceteræ potestates quæ *Dei leges* et *seculi negotia* justa consideratione *definiant*." Leg. Hen. I. § 31. De Capital.

was carried into execution [1]. Whatever was the mode resorted to for determining the question in dispute, whether testimony of witnesses, the oaths of compurgators or cojurors, or the judgment of God, each of which will be adverted to in the succeeding chapter, the deman, or domesmen, the thanes or judges of the court, in the same manner as the *scabini* of the Francs [2], and *judices* of the Romans, not only found the truth of the facts which they had to try, but also, under the directions of the eorl, or bishop, or the gerefa, pronounced the judgment, which, according to law, was consequential on such finding. This was uniformly the practice during the time of the Anglo-Saxons [3].

Judges.

Plac. See to the same effect, Leg. Eadg. § 5. Leg. Cnut. § 17. Wilkins, p. 136. "Et toti simul hundredo unus de melioribus, et vocetur aldermannus, qui Dei leges et *hominum jura* vigilanti studeat observantia *promovere*." Leg. Hen. I. § 8. et V. Hist. Eliens. Gale, p. 478.; ibid. p. 484. See also the trial between the bishop of Rochester and Pichott the sheriff, in the time of William the Conqueror, from which the duty of the bishop at the schyre gemot appears at that period also to have been such as is stated in the text. Thorpe's Regist. Roffense, p. 32.

[1] In the history of the church of Ely, the narrator, after stating the verdict and judgment of the *judices*, which gave certain lands to the abbot, states, "Præcepit itaque Ægilwynus alderman, ut Oschetelus et alii eandem terram circuissent, et abbatem super eam duxissent." Hist. Eliens. p. 478.

[2] V. Leg. Salic. tit. 60.

[3] "Quia nil a nullo exigi vel capi debet nisi de jure et ratione per legem terræ et justitiam, *et per judicium curiæ*,

In order to enforce the attendance of a sufficient number of thanes, or judges, every one who, after being duly summoned, a duty which it was the province of the gerefa or his officers to perform, absented himself from the mote without a sufficient excuse, was liable to a heavy fine[1]. In latter

sine dolo, sicut prius statutum est, maxima consideratione," &c. Leg. Hen. 1. § 8. "Unusquisque per *pares suos* judicandus est, et ejusdem provinciæ." The following quotations may suffice to show that the same doctrine prevailed before the Conquest. "Si quis alterum criminis pertulit, et tunc eum ad conventum vocet, statim is alteri fidejussorem tradat, et ipsi rectum faciat quod illi Cantuarii *judices* (deman) imponent." Leg. Loth. et Edric. § 8. "Et si quis injustitiam committat vel injustum judicium deinde judicat, sit apud regem capitis æstimationis reus, nisi juramento confirmare audeat quod justius aliquod nesciret, et perdat semper *thani* dignitatem—et si quis justam legem et justum judicium dare detractaverit, reus sit apud eos ad quos pertinet, si *apud regem* cxx. sol., et si apud *comitem* ix. sol; si apud *centuriam* xxx. sol." &c. Leg. Cnut. § 14. Wilkins, 135. Bromton, p. 924. Et v. Leg. Polit. Eadg. § 3. Wilk. p. 77. "Nam in vita regis Edwardi protestata super eis (terris scil.) lite et causa sæpius ventilata, cum demum apud Northampton *totius curiæ concors sententia* eas regis dominico *adjudicasset*." Hist. Rames. c. xlv. p. 414. Et v. ibid. c. xlvii. In treating of the modes of proof in use amongst the Anglo-Saxons, I shall have occasion to cite other authorities illustrative of the position stated in the text.

[1] "Qui ad hundredum summonitus, sine aliqua et vera necessitatis causa venire noluerit, capiatur de suo xxx. denarii," &c. "Qui ad comitatum secund. legem summonitus venire noluerit, xx. marc. culpa sit in West Saxa," &c. Leg. Hen. 1. § 29. and 51. See to same effect, Leg.

times, a distinct fine was imposed in respect of each cause or prosecution, which was noticed in the summons of the party who absented himself. As every considerable land-owner was thus liable to be continually called upon to act in the character of a judge, there are in the Anglo-Saxon laws numerous regulations for their conduct when engaged in the exercise of this very important duty [1].

During the heptarchy, when the schyres in each kingdom were small, and the greatest proportion of the lands was in the possession of the original invaders, or their descendants, the number of thanes, or landed proprietors, who were collected at the county courts, even when all attended, was not so considerable as to prevent the decision of each question being put to the whole assembled body. But when the kingdoms of the heptarchy were united under one sovereign, at which time the counties were greatly enlarged [2], and the lands

Athelst. § 20. Wilk. p. 60. The same provision is to be found in the capitularies of the Francic monarchs. Cap. ad Ann. 769. in Baluze, to. i. p. 192.

[1] Thus, in the laws of Edgar, "Quodlibet factum judex (dema) discernere debet prudenter quomodo factum est, et ubi vel quando." Leg. Edg. Wilkins, p. 87. "Judex (dema) qui alicui injustum judicium judicat solvat regi cxx. sol." Ibid. p. 77. "Judica semper rectum judicium 'ryt-nedom,' neque facias aliud jus diviti aliud pauperi, nec aliud jus amico aliud inimico facias —semper evitas mendacium." Leg. Ælf. § 43. 44.

[2] See Lingard's Hist. of England, vol. i. p. 473-4.

had become subdivided into small portions by sale and gift, it became extremely inconvenient to leave the decision of any question to so numerous a body as was collected at the county court, or even at the hundred mote. Accordingly, about the time of Edgar[1], a practice appears to have obtained of causing a certain number of the thanes to be appointed to decide upon each question that was brought before the court[2]. However, in the reign of Edgar, Edward the Elder, and Ethelred his son, we still find judgments given in civil

[1] In the history of the monastery of Ramsay, c. xlvii. p. 415. an instance may be seen of the thanes assembled at the mote recommending that a question brought before the county for decision should be referred to 36 of their number, one moiety to be chosen by each party.

[2] In the history of the monastery of Ely is the following account of a trial had at a mote held at Cambridge in the time of Ethelred, son of Edgar. "Deinde venit Ægilwinus alderman ad Ely, fuerunt que Begmundus et alii pro hac causa vocati et summoniti ad placitum civium et hundratenorum semel et secundo—tandem veniens Ægilwinus alderman ad Granteburge habuit ibi grande placitum civium et hundratenorum, coram xxiv. *judicibus*. Narravit igitur palam abbas omnibus quomodo, &c.—tunc *judicantes* statuerunt ut abbas suam terram habere deberet." Et v. Hist. Eliens. c. xiii. p. 471. The laws of Henry the First, § 31. Wilkins, p. 248. show that the practice of selecting the *judices* became very general in most parts of England. Had the *judices* so chosen been appointed for any definite term, they would have exactly answered to the *scabini* and *sagibarones* of the Francs and other continental nations.

suits by the whole body of thanes assembled at the mote [1].

[1] See particularly Hist. Rames, c. xlv. p. 414.: "totius curiæ concors sententia." Hist. Eliens. c. xlv. So in the laws of Canute: "Et si quis terram defenderit testimonio provinciæ (scyre Gwytnesse) sine lite illam possiderit dum vixerit, atque post obitum det et concedat ei qui ipsi amicissimum est," Leg. Cnut. § 76.; which words seem to refer to the judgment of the whole body of the thanes. Even in the time of William the Conqueror, the same mode of proceeding, namely, collecting the whole body of the county, was resorted to for the decision of important causes. The documents from which this appears are important, as showing that the ancient institutions of the Anglo-Saxons were continued by the Normans: I shall therefore set them out at some length. Both are from the Registrum Roffense. The first is an account of a dispute between Archbishop Lanfranc and Odo, bishop of Bayeux, concerning some lands in Kent claimed by the archbishop: "Præcepit rex *comitatum totum* absque mora considere, et homines comitatus omnes Francigenos, et præcipue Anglos in antiquis legibus et consuetudinibus peritos, in unum convenire. Qui cum convenerunt apud Penenidinam omnes consederunt et—totus comitatus per 3 dies fuit ibi detentus—et ab omnibus illis probis et sapientibus hominibus qui affuerunt, fuit ibi diratiocinatum et etiam toto comitatu concordatum et *judicatum*. Quod sicut ipse rex tenet suas terras liberas et quietas in suo dominico; ita archiepiscopus Cantuarberiæ tenet suas terras omnino liberas et quietas suo dominico. Huic placito interfuerunt Gorsfridus episcopus Constantiensis, qui in loco regis fuit, et justitiam illam tenuit comes Cantiæ, &c. Ricardus de Tunebrigge, &c. &c. et alii multi barones regis, et ipsius archiepisc. &c. et alii aliorum comitatum homines; etiam cum toto isto comitatu multæ et magnæ auctoritatis," &c. (Regist. Roff. p. 28.) Again, on a dispute between Gundulph,

On the Welch borders, where there was a considerable intermixture of inhabitants, it was directed, in the time of Ethelred the Second, that twelve persons skilled in the law should be appointed to decide each cause that should arise between a Welchman and Englishman, of whom six should be English and six Welch [1]. The twelve

bishop of Rochester, and Pichot, sheriff of Cambridge, the same king ordered that all the men of the county should assemble, under the presidency of the bishop of Baieux, to determine the dispute. The persons assembled, overawed by the sheriff, determined that the land belonged to the king; the bishop, not being satisfied, desired the persons assembled who had given the judgment, to select twelve of their number to confirm their judgment on their oaths: this they did. But one Grim, a monk, having informed the bishop of Rochester of some facts that he knew, which plainly showed that the land really belonged to him, he immediately communicated the intelligence to the bishop of Baieux, who interrogated two of the twelve as to the rectitude of their judgment, when they confessed that they and their companions had given a wrong judgment. On this the bishop of Baieux ordered the sheriff to send other twelve of the best men of the county to London, there to meet some of the first barons of the land, who having all met together, they adjudged that the first twelve were perjured, and that the lands belonged of right to the bishop of Rochester; and the ten who had not confessed, having affirmed that they had not assented to the wrong judgment, it was remitted to the county court to decide that question; and the ten, not being able to clear themselves at the county court, were there (judicantibus aliis sui comitatus hominibus) fined 300 pounds to the king. Reg. Roff. p. 32.

[1] "XII. homines legales (lahmen) debent jus docere

lawmen, who, as appears by Domesday, had *sac and soc* in the city of Lincoln in the time of Edward the Confessor and William the Conqueror, may possibly have been originally assessors, chosen in the same manner; but at this period they seem to have united in themselves the office of the sheriff, as well as of assessors [1].

The treatise, called the Laws of Henry the First, declares, according to what appears to have been the ancient practice, that in all cases where there was a difference of opinion amongst the judges, or assessors, the majority should prevail [2].

(ryhte tæcean) Wallos et Anglos, sex Angli et sex Walli; perdant omnia quæ illis propria si injuste doceant, vel excusent se quod melius non possent." Senat.-consult. de monticol. Walliæ, temp. Ethelred II. The word *tæcean* in the above law is, I think, improperly translated *to instruct*. The words, 'as the judge shall *determine*,' Exodus, c. xxi. v. 22. are rendered in Alfred's translation of the Bible, "Swa micel swa dæman *tæcan*," (Lye's Saxon Dictionary). In Wilkins, Leg. Ang.-Sax. p. 101. the word *getæce* is evidently used in a similar sense. And comparing the last clause of the above law with the similar expressions to be found in Leg. Gulielmi, 1. § 15. and 41. Leg. Cnut. § 14. and Leg. Polit. Eadg. § 3. which clearly relate to *judices*, or assessors, and with § 31. of the laws of Henry the First, it appears to me that the import of the law above quoted is such as I have given to it in the text. See, however, Hallam's Middle Ages, vol. ii. p. 399.

[1] "In ipsa civitate, Lincolia, *erant* xii. lagemanni, i. e. habentes sacam et socam. Hardicnut, &c. *Modo* sunt ibi totidem habentes similiter sacam et socam." Suardine," &c. Domesday, Lincolescire, Gale, p. 775.

[2] "Quod si in judicio inter pares oriatur dissensio, de

The right of the plaintiff and defendant, and of the prosecutor and criminal, to challenge the *judices*, or assessors, appointed to try the cause in civil matters, and to decide upon the guilt or innocency of the accused in criminal matters, is recognized in the treatise above alluded to [1]; but I cannot discover from the Anglo-Saxon laws or histories, that before the Conquest the parties had any general right of challenge: indeed, had such right existed, the injunctions to all persons standing in the situation of judges to do right according to their conscience would scarcely have been so frequently and anxiously repeated.

Grand juries.

A custom peculiar to criminal proceedings was introduced in the reign of Æthelred the Second,

quibus certamen emerserit, vincat sententia plurimorum." Leg. Hen. 1. § 5. Wilk. p. 237. Et v. Lib. Constitut. temp. Æthelred. Wilkins, p. 118.

[1] "In omnibus causis ecclesiasticis et secularibus pensanda est accusantium intentio, testium modus, et *judicum electio*. Si in testibus et judicibus et personis satisfactum sit ei (i. e. accusato), si judicibus consentiat; advocet, aut contradicat—*judices* sane non debent esse, nisi quos impetitus *elegerit*," &c. Leg. Hen. 1. Wilkins, p. 236-8. The same regulations prevailed amongst the Francs, Capit. lib. vii. § 309.; they are evidently of Roman original. It may be here remarked, that there are numerous passages in the treatise called the Laws of Henry the First, which are taken from the Theodosian code. See particularly p. 247. § 28. p. 249. § 32. ed. Wilkins. The books of Additamenta to the capitularies of the Francic sovereigns, also, are almost wholly compiled from the same code.

from which probably the office of our present grand juries was derived. It was this: Æthelred ordained, that in each assembly of the wapentake, or hundred, twelve of the elder thanes should be chosen to present all such persons as they should find to have committed any crime; and each person whom the jury of twelve so presented was bound to give security, and to clear himself of the crime imputed by the requisite number of compurgators, or by ordeal [1].

Appeals. I do not find in the laws any express recognition of the right of appeal from the hundred court to that of the county, though it is plain, from the histories of the times, that appeals were frequently carried from the one court to the other [2]. Each of the parties, both in civil and criminal cases, had a right to appeal to the king from the judgment

[1] Leg. Æthelred. Wilkins, p. 117. The following passage in Matthew Paris seems to refer to the same custom: "Temp. Hen. II. (A.D. 1164. ap. Clarendon.) facta est recordatio cujusdem partis consuetudinum et libertatum antecessorum suorum, regis videl. Hen. I. avi sui, et aliorum." And amongst other customs so recorded is the following: "Laici non debent accusari nisi per certos et legitimos accusatores et per testes in præsentia episcopi—et si tales fuerint—qui culpantur quod non velit vel non audeat aliquis accusare eos. Vicecomes requisitus ab episcopo faciat jurare *xii. legales homines* de insuero sive de villa coram episcopo quod *veritatem secundum conscientiam suam manifestabunt.*" Matt. Par. Hist. p. 84. et v. Bracton, 143. *a.*

[2] See particularly Hist. Eliens. c. xliv. p. 484. "Hoc idem *iterum* alia vice statutum erat apud Grantebrigge."

given in the county court, the hundred court, the burg-mote, and the hall-mote: but during the time of the Anglo-Saxons, and indeed down to the time of Henry the First, no one was at liberty to proceed in the king's court until he had first endeavoured to obtain justice in the provincial tribunal, having jurisdiction over the place in which the defendant resided [1]. It was in the king's court alone that any remission of the rigour of the law on principles of equity could be obtained [2], and for this purpose the doctrines of the Theodosian code, with which the dignified clergy were very familiar, would no doubt be resorted to. The general jurisdiction assumed by the king's court by writ issuing out of Chancery, which still continues to be exercised, was unknown to the Anglo-Saxons, and did not become generally established amongst the Normans until the reign of Henry the Second [3].

[1] Wilkins, p. 249. § 33. The authorities on this subject from the laws of Athelstan, Edgar, Canute, William the First, and Henry the First, are collected. Edinb. Review, No. 69. p. 10.

[2] Leg. Polit. Eadg. § 2. Leg. Cnut. § 16.

[3] Edinb. Review, No. 69. p. 13, &c., and Madox, Hist. of the Exchequer there cited.

CHAPTER XXIII.

FORMS OF JUDICIAL PROCEEDINGS.

GENERALLY speaking, the same mode of trial was pursued in civil as in criminal cases. Indeed there were few questions brought for decision before the Barbarian tribunals that did not present themselves in a great measure as criminal proceedings; the complaining party having generally suffered some personal harm, or been violently despoiled of his property. I shall therefore pursue this inquiry under one title. The notions of writers in regard to the origin and nature of the trial by compurgation, which was the mode most generally in use amongst the Barbarians, appear to be still unsettled. I therefore purpose to enter into this subject somewhat at large. As the codes of the Thuringians and Frisons exhibit the simplest form of judicial procedure, I shall commence by stating in succession the rules and regulations which are to be found in these codes.

Amongst the Thuringians.

It appears from the code of the Thuringians, the most simple of the Barbarian codes, that when a man suspected another of having committed any offence, for which he had a right to seek reparation or vengeance, he detailed the circumstances which led to the suspicion, and charged the suspected person before the county court. If, in the judgment of the court, the circumstances required investigation, the accused was called upon to defend himself. If he denied the charge, he was admitted, in matters of small moment, to exculpate himself by his own oath, and by producing a number of freemen (how many depended on the magnitude of the offence [1]) to swear they believed that he had sworn to the truth. If the defendant produced the requisite number of compurgators, or persons swearing to his veracity, and they took the requisite oath, the matter was finally settled. However, in weighty matters, as in questions as to the freedom of individuals, and in general on all charges, the composition for which amounted to two solidi, and which would include every species of personal injury, it was in the plaintiff's power, either to admit the defendant to defend himself by compurgators [2], or to call on the

[1] Five were required for less considerable injuries. Leg. Anglorum et Werinorum, i. e. Thuringorum tit. 12.

[2] Twelve compurgators were required on a charge of murder. Leg. Thuring. tit. 1. § 3.

defendant to prove his innocence by the judgment of God. This judgment was sought to be obtained amongst the Barbarians in two ways, namely, by battle and by ordeal: the former only was in use among the Thuringians. If the plaintiff therefore chose to claim the judgment of God, a single combat was fought between himself and the defendant: he who was conquered was declared to have asserted a falsehood, and had judgment pronounced against him [1].

Battle.

Amongst the Frisons.

The code of the Frisons exhibits the laws of the Barbarians in the next stage of departure from their original simplicity. The method of defence by compurgators was in use, also, in this nation; and for the same offences as with the Thuringians. In general, the number of compurgators to be produced was determined by the judge [2]; but eleven at least of the same rank with the defendant were necessary on a charge of murder. Cases are also mentioned in which the plaintiff might be put to his oath: Thus, where a man claimed another as his slave, who insisted that he had purchased his freedom of the claimant, the person claimed might say to the claimant, "Either do you, by the oath of six, twelve, or

[1] Leg. Thuring. tit. 1. c. 3. tit. 2. et seq. Ib. tit. 8. tit. 12. and tit. 15.

[2] Leg. Frisionum, tit. 1. § 1. tit. 4. § 2.

twenty *cojurors*," or even thirty, if he chose to name that number, " and your own oath, obtain me as your slave, or permit me, by the oath of my *compurgators*," specifying the number, " to clear myself from this calumny." If the claimant accepted one of these alternatives, the cause was decided according as the conditions were complied with or not [1]. But the claimant or the defendant might, if he chose, have the question determined by battle. In order to obtain this determination, the party proffered himself, saying, " I alone will swear to the truth of what I assert; do you, if you dare, contradict my oath, and contend with me in arms." The party to whom the challenge was given was bound to comply with the requisition, or he had judgment pronounced against him; and in case the challenge were accepted, the battle of course decided the matter. Battle.

In this code, we meet with the second method of obtaining the judgment of God, namely, by *ordeal*. Of the various kinds of ordeal introduced into the different nations of Barbarians, that chiefly in use among the Frisons was the method by boiling water. If a person charged with theft denied it on oath, and the plaintiff swore to his Ordeal.

[1] Ibid. tit. 11. de lito § 1. 2. and 3. It is scarcely probable that a mode of trial so nearly resembling the mode of putting the decisory oath amongst the Romans should not have been framed on that model.

guilt, both the plaintiff and defendant had to submit to trial by boiling-water ordeal. The party convicted of falsehood on the trial paid sixty solidi to redeem his hand, which otherwise was cut off as a punishment for his having sworn falsely [1].

Divination. In case a man were killed in a crowd, and the person to whom it belonged to sue for his were-gild were unable to charge any particular man with the crime, the Frisons, in one part of their territory, had recourse to the ancient method of divination. The plaintiff might select any seven who were present in the crowd: two pieces of twig, one of them marked with a cross, were wrapped up in white wool, and placed on the altar: one of them was then drawn by a priest or a little boy: if the plain twig were drawn, it determined that the guilty person was among the seven. Seven other pieces of twig were then drawn in a similar manner, and the owner of the last drawn twig was declared to be guilty [2]. In other parts of the territory of the Frisons, trial by ordeal and by battle was resorted to in cases of the above description, in order to discover who committed the act. In most cases where battle was resorted to amongst the Frisons, it was not

[1] Leg. Fris. tit. 3. § 5. and 6.

[2] Leg. Fris. tit. 14. § 1. V. Tac. de Mor. Germ. c. 10. *ante*, p. 224. It is remarkable that a similar practice to that recorded by Tacitus prevailed amongst the Scythians. Herodot. iv. 67.

necessary that the parties themselves should fight; the question might be equally decided by a combat between champions hired for the purpose [1]. Champions.

In the remainder of the codes of the continental nations, the mode of proceeding and rules in regard to proof were considerably more complex; and, in addition to the rules as to proof by co-jurors and compurgators, and by the judgment of God, each of these codes contains regulations as to proof by the evidence of witnesses. Amongst the other Barbarian nations.

According to the institutions of the Alemans, Bavarians, and Francs, when any one desired to commence proceedings at law against another, he applied to the count to compel the appearance of his adversary [2], on which the count despatched one or more of his officers to the defendant, to give him notice of the complaint alleged against him, a practice evidently adopted from the Romans. Mode of compelling appearance.

The defendant was bound to appear at the next court. If he did not appear, or send some

[1] Leg. Fris. tit. 14. § 4. tit. 5. § 1.

[2] Leg. Alam. tit. 36. Bavar. tit 2. Sal. tit. 52. § 2. Rip. tit. 32. § 2. Amongst the Salic Francs, the plaintiff himself, according to the old Roman practice, first in the presence of witnesses, summoned the defendant to appear, and did not apply to the count unless the defendant refused to appear on that summons. Leg. Sal. tit. 1. § 3. tit. 52. § 3.

good excuse[1], he incurred a fine for each contempt. When the defendant appeared, he was bound to give sureties to the count to pay the demand or pay the composition, according to the nature of the complaint made against him, in case he failed in making a sufficient defence. I proceed to a consideration of the rules which prevailed in regard to proof, and how such proof was adduced.

Modes of proof.

The rules as to proof contained in the codes now under consideration may be considered under three general heads, namely, 1st, proof by testimony; 2d, by cojurors and compurgators; and, 3d. by the judgment of God. The first and second I shall consider together, as a comparison of the two will best show the nature of each.

Distinction between compurgators and witnesses.

The general distinction, though perhaps not universally acknowledged by the Barbarians[2], between compurgators or cojurors, and witnesses, was this: Every witness swore to his own knowledge of the particular parts which he stated. Compurgators or cojurors, on the other hand,

[1] "Si eum *sunnis* non detinuerit." Leg. Sal. tit. i. 47. 51. &c. Rip. tit. 32. *Sunnis* was converted into *sonnia*, afterwards *exonia*, and thence into *essoine*. V. Beaumanoir, ch. iii. et Gloss.

[2] There is in this respect considerable confusion in the law of the Burgundians, which perhaps can only be explained by the observation of Eccard in regard to the manuscripts of this code: "Alter a septingentis exaratus, sed ab imperitis amanuensibus, qui quod scribebant minimè intelligebant." Hist. Franc. to. iv. p. 253.

were not necessarily supposed to have any knowledge of the fact itself; they merely swore to their belief in the truth of the assertion of their principal, whether he were the plaintiff or defendant in the action; and this they did in general on their acquaintance with his character [1]. On this principle, the law of the *Burgundians* declared, that the compurgators to be produced by a person charged with a crime on suspicion should be, first, his wife and children, and sufficient of his relations to make up the number of twelve; if he had no wife or children, his father or mother, with a sufficient number of other relations, were to supply their place; if there were no father or mother, the accused was obliged to swear with his twelve nearest relations [2]. The same principle is observable in the law of the Alemans. When the composition for which a cause arose amounted to no more than one solidus, a man might clear himself from it by the oath of any one he could procure; but, if it exceeded that sum by two denarii [3], the plaintiff was allowed to nominate three persons as compurgators, *electi juratores*; and whom he was at liberty to select from amongst the persons,

[1] Leg. Ripuar. tit. 30. § 1. and see the distinction between proof by *sacramentum* and *per testes*, Leg. Sax. tit. 5. § 3.

[2] Leg. Burgund. tit. 8.

[3] A *saiga* or *denarius* was the fourth part of a *tremissis*, which was the third part of a *solidus*.

best acquainted with the character of the defendant. Of these the defendant might reject two: if the third would join the defendant in swearing to his belief to the truth of what the defendant had sworn, he was acquitted; if not, he was declared guilty [1]. So, when a man was charged with the crime of *mortaud* [2], that is, of having slain a man or woman, and hidden the body, so that it was deprived of funeral rites, the number of compurgators requisite to clear the defendant, if he brought any that he could procure, was eighty; but if the plaintiff chose the compurgators, the oath of fourteen men so chosen, on account of their supposed acquaintance with the defendant's character, was sufficient to clear him [3]. Among the Lombards, also, if the cause of action, or the composition, amounted to twelve solidi, the plaintiff was at liberty to nominate half the compurgators; but, in civil cases, the plaintiff was bound to choose the compurgators from among the nearest relations of the defendant, whom the law supposed best acquainted with his character, omitting only such as had discovered any enmity to the plaintiff, as by striking him, concerting his death, or wrong-

[1] Leg. Alam. tit. 6.

[2] This crime was called *murdrido* by the Bavarians, *murdrum* by Glanville.

[3] Leg. Alam. tit. 86. See also ibid. tit. 53. where five of the compurgators are directed to be nominated by the accuser, seven by the defendant. Et V. Baluze, to. i. p. 398.

fully disposing of his property; the defendant, with such other persons as he chose to bring, made up the remainder of the number required [1].

Amongst the *Anglo-Saxons*, also, parties were in many cases put to defend themselves by compurgators selected from amongst their neighbours [2]. This mode was afterwards known by the expression of defending *by the country*, as the producing compurgators chosen by the party himself was called *waging his law* [3]. Anglo-Saxons.

The oath of compurgators or cojurors and witnesse, was made on the altar, the holy evangelists or relics, or consecrated arms [4]. Amongst most nations, compurgators uttered nothing; each of them laid his hand on the altar, or sacred thing; their principal placed his hand above all, and made the requisite asseveration [5]. Witnesses, of course, related their evidence. Every one was bound to appear at the place appointed when called upon as a compurgator; if he there refused to join in taking

[1] Leg. Long. ii. 55. 5. and ibid. ii. 21. 9.

[2] Leg. Eadw. § 1. Wilkins, p. 48. Leg. Æthelr. ib. p. 118. Leg. Hen. I. § 66. ib. p. 264. et v. 276.

[3] At least so it appears to me from Stat. Walliæ, 12 Ed. I. c. 9. and 14.; Vide *infra*, p. 476.

[4] Ducange, Gloss. voce Sacramentum. Leg. Bavar. tit. 16. § 6. Leg. Long. ii. 55. 5.

[5] Leg. Alam. tit. 6. § 7. Amongst the Anglo-Saxons, all the compurgators appear to have taken the oath. It was as follows: "In Domino juramentum purum est et immune, quod N. jurabat." Leg. Æthelst. Wilk. p. 64.

the oath, he was, as appears by the law of the Lombards, bound to assign the particular reasons which induced his refusal, and to swear that he was not acting in collusion with the opposite party, and that he could not be one of the compurgators, from the fear of losing his soul; and in that case the party for whom the oath was to be taken had a certain time to find another compurgator. He who refused to swear, or to give his reason, and make the requisite exculpatory oath, was liable for all the damage which the defendant sustained on losing the cause [1]. Witnesses, also, were bound to appear when summoned [2]. Compurgators, as well as witnesses, were liable to the pains of perjury. Compurgators were considered as perjured when the party for whom they appeared and offered to swear lost his cause by the requisites not being fully complied with [3]. No man, amongst the Francs, could be condemned on the testimony of a single witness [4].

Origin of compurgation.

The system of compurgation, so far as putting *the party himself* to his oath, evidently had its origin from the decisory oath of the Romans.

[1] Long. ii. 55. 14.

[2] Leg. Sal. tit. 51. Leg. Rip. tit. 50. However, in after times, no one could be compelled to appear as a witness in a case where he was liable to be challenged to fight. See Beaumanoir, p. 316.

[3] Leg. Rip. tit. 66. Burgund. tit. 45. Et v. Leg. Alam. tit. 42. § 1. 2. &c.

[4] Capit. lib. vi. § 40.

The mode of putting the oath prescribed in the law of the Frisons[1] clearly shows this. There is a report of a cause decided by compurgation, in the reign of Ethelred, the son of Edgar, which in my mind leads to the same conclusion, and which affords so striking an illustration of this subject, and of the general mode of proceeding amongst the Anglo-Saxons, that I cannot refrain from presenting it to the reader in detail. One Alfwold, having a piece of land in Swafham, lying contiguous to the estates of the monastery of Ramsey, which land he had purchased from one Æthelwold, exchanged it with the monastery for two hides of land in Stapleford, which Ædnoth, one of the lay brothers, had purchased for the benefit of the monastery; but Alfwold being dead, one Alfnoth claimed the land in Swafham, and summoned Ædnoth, with others of the brothers, to appear and answer concerning the land before the judges (*judices*) at Wendlebury, at a court at which Earl Ailwyn and Edric the king's sheriff, presided. The trial being commenced, and each side having stated his case, by the advice of the chief persons there assembled, thirty-six thanes, or barons, equally chosen from the friends of each party, were appointed judges to decide the matter. These thirty-six left the court, and went to some place where the matter was discussed before them for a considerable time: at length Alfnoth stood

[1] *Ante*, p. 175. and 460.

forth and interrogated Ædnoth and Alfwyn, another monk of the same monastery, who was there with him, by what title and from whose gift the monastery held the lands? to which Ædnoth answered, that they held the lands from the gift of an illustrious man, who held it free from all claims, and with full power to dispose of it; on which the claimant asked him *if he dared verify the truth of his assertion by the corporal oath of himself and his brother monk*, that *all controversy might be put an end to*. Brother Ædnoth immediately consented to take the oath required, and every one approved this mode of proceeding; but Earl Ailwyn, hearing what was about to be done, and considering that no monk ought to make oath before the secular power, came forward, saying that he was advocate of the church of Ramsey, and the guardian of their possessions, and that to him it belonged to swear the oath required "ad se hujusmodi juratoriæ cautionis exhibitionem pertinere," and which he declared himself ready to do; on which the judges held, that after such a declaration from so great a personage, it was not necessary that any oath should be taken; and they gave judgment in the same manner as if the oath had been taken, and adjudged all the lands and goods of Alfnoth to be in the mercy of the king for his false claim[1]. The introduction of the *con-*

[1] Hist. Rames. Gale, p. 416. In one case, Bishop Ulthof offered to take an oath with 1000 cojurors, that

firmatory oath of the cojurors of the plaintiff, and of the compurgators of the defendant, was entirely an invention of the Barbarians.

Cases in which compurgation was resorted to.

The distinct natures of the mode of proof by testimony and by compurgation, having been noticed, I proceed to mention various cases in which the one mode or the other was permitted, or prohibited, or particularly directed to be pursued.

Amongst the continental nations.

Among the *Alemans*, if three or more persons of good fame, that is to say, who had not perjured themselves, or were not reputed liars, or receivers of bribes, would swear of their own knowledge that a man had committed murder, theft, or any delinquency, for which the fredum became due, the crime was considered as proved, and such person was not allowed to make defence by compurgation [1].

Amongst the *Bavarians*, sales were required to be attested by witnesses either subscribing the instrument of sale, or being present at the sale, and having their ears pulled, to imprint it on their memory: indeed, all transactions of moment between individuals seem in this nation to have been

certain land which he claimed belonged to him. The demandant declined to accept the oath so proffered; on which the land was adjudged to the bishop, in the same manner as if the oath had been taken. Hist. Eliens. c. xxxv. p. 479.

[1] "Ut propter suam nequitiam alii qui volunt Dei esse non se perjurent." Leg. Alam. tit. 42. § 1. and 2. Simil. Decret. Childebert. § 7.

settled before witnesses of the latter description. In all questions as to the validity of the transaction so concluded, a man was at liberty to produce the witnesses in support of his case; and if more than one were produced, one of them was chosen by lot to take the oath, and his evidence, if not falsified in the manner to be afterwards mentioned[1], established the case of the party producing him.

Witnesses were required to be produced in all questions as to ownership of land; and where their evidence was not falsified, it decided the question[2].

Amongst the *Bavarians* also, on accusations of theft, the judge was bound to use his utmost exertions to discover the truth or falsehood of the charge by satisfactory evidence, and was forbidden to allow the defendant to clear himself by compurgation till he had satisfied himself that no such evidence could be produced[3].

Sales among the *Ripuarians* also were attested by subscribing witnesses to the deed, and by the notary; or where there was no deed, by witnesses who had been pulled by the ears at the completion. It was necessary that the notary[4] and witnesses, if alive, should be produced on all

[1] V. *post.* Trial by battle.

[2] Leg. Bavar. tit. 15. § 2. tit. 16. § 1. 2. and 6.

[3] Ibid. tit. 16.

[4] If the notary were dead, his hand-writing might be proved by comparison with other documents in his hand-writing. Leg. Rip. tit. 59.

questions as to the legality of such transactions; and their evidence, if not invalidated, decided the cause. If witnesses could not be produced, recourse was had to the oaths of *cojurors* [1]. All the forms which were necessary to be observed in proceedings at law, were required to be done in the presence of witnesses, who were called upon to give evidence of the same in court when occasion required [2]. Among the *Saxons*, also, on all questions as to the ownership of land, witnesses were required to be produced to prove the title of the claimant; and if the occupier still denied the claimant's title, recourse was had to trial by battle [3]. No man, according to the Saxon law, was allowed to claim any property, whatever number of cojurors he could produce in support of his claim, in case the possessor could produce three or more witnesses from his own neighbourhood, who would swear to his title [4].

Amongst the *Lombards*, when any question arose in regard to a sale, the attesting witnesses to the deed or charter were required to be produced, to prove its validity; no other evidence was admitted [5].

If a man in his own defence killed another, the law of the *Lombards* and of the *Burgundians*

[1] Leg. Rip. tit. 58. 59. 60.
[2] Ibid. tit. 62. &c.
[3] Leg. Sax. tit. 15.
[4] Ibid. tit. 5. § 3.
[5] Leg. Long. ii. 51. § 1.

allowed him to prove, by witnesses, the circumstances in extenuation. In the latter nation, instruments of gift or devise could not be proved by less than five witnesses [1].

Amongst the Anglo-Saxons.

Amongst the *Anglo-Saxons*, in criminal cases, the judices or thanes of the court appear to have had a discretion as to the mode of proof to be resorted to: thus, in cases where witnesses were produced by the parties, and the matter still remained in doubt, the judges were at liberty to call upon the party accused to clear himself by the oaths of a certain number of compurgators, who were directed to be brought *from the neighbourhood* of the place where the criminal resided, in order that they might be persons well acquainted with his character [2]; and even after the production of the compurgators, it was competent to the judges, if they still had doubts, to put the accused to the more solemn test of ordeal [3].

[1] Leg. Burg. tit. 60. The number 5 appears to have been adopted from the old Roman law, in regard to the fictitious sale by which heirs were originally appointed.

[2] Leg. Lothar. et Edr. § 5. Wilkins, p. 8. &c.

[3] Vide Leg. Edovard. § 27. Wilkins, p. 202. "Si justitia habet eum suspectum purgabit se *judicio* hundredi vel scyræ;" et v. Leg. Æthelr.; ibid. p. 117. Leg. Cnut. § 24. ib. p. 137. In the Hist. Eliens. c. xliv. p. 483. is an instance of the *judices* requiring the defendant, *after witnesses had been examined*, to clear himself, if he could, with a certain number of compurgators.

In regard to civil cases, all sales and exchanges were directed to be made in the presence of witnesses, in order that they might give their testimony as to the transaction before the proper tribunals, in case any question arose concerning it [1].

Edgar required that thirty-three in every city, and twelve in every smaller town and hundred, should be chosen to bear witness in the manner above described. Canute repeated these directions, and enacted that no one should be heard to claim any property which he alleged to have purchased, unless he brought witnesses of this description. An oath was administered to the witnesses when produced, that they would not be biassed by interest, favour, affection, or fear, and would state nothing but what they had themselves *seen* or *heard* [2]. If the party who claimed to have obtained the thing in dispute by sale or gift before witnesses, produced the witnesses, their evidence was conclusive; for it was assumed that the possessor must have stolen it, unless he could produce witnesses to give evidence of a subsequent sale or gift [3]. If, however, neither party could produce witnesses to

[1] Leg. Lothar. et Edric. § 16. Wilk. p. 9. Leg. Inæ, § 25. p. 18. Leg. Æthelst. § 15. 17. 31. Bromton, p. 842-3. Et V. Wilkins, p. 58.; Leg. Eadg. ibid. p. 80-1. Leg. Cnut. § 22. p. 137. Leg. Edov. § 38. p. 209. Leg. Will. 1. Ibid. p. 218. Ibid. p. 226.

[2] Leg. Æthelst. p. 64. Leg. Eadg. p. 80-1. Leg. Cnut. p. 137.

[3] V. Leg. Cnut. § 22.

prove his title by any such gift or sale, then the defendant was at liberty to prove his title by producing so many cojurors, indiscriminately selected, as the plaintiff chose to name [1].

If the defendant could not procure the requisite number of indiscriminate cojurors, then the sheriff [2] was called upon to name six men from the neighbourhood where the defendant lived [3]; and in case the dispute, as commonly happened, was concerning sheep or cattle, the defendant was bound to procure one more cojuror for each head of cattle. If the property in dispute were of any other description, the number of additional cojurors to be produced was equally determined by the value. In case such persons would swear that they believed that what the defendant affirmed was true [4], judgment was pronounced in his favour; in case the co-

[1] The law is indefinite on this point: the words are, "Jusjurandum inveniat si possit non cooptatum in quo *petitori satisfaciat.*" Leg. Eadw. § 1. See this law continued in the next note but one.

[2] Or the plaintiff; *which* is not mentioned. In criminal cases, the cojurors were selected by the sheriff. Wilkins, p. 118. Leg. Hen. I. § 66. p. 264. and 276.

[3] "Si autem non possit, tunc nominentur ei sex viri in *eadem viciniâ* in qua ipse degit, et obtineat pro illis sex, unum pro uno animali, vel pro pecore quod illud valeat, et postea crescat secundum emptionis æstimationem," &c. Leg. Eadw. § 1. Wilkins, p. 48. et V. Leg. Wihtræd. p. 12. Leg. Hen. I. § 66. p. 264. and 276.

[4] "Verè dictum."

jurors would not take such oath, judgment was given for the plaintiff or demandant. When the dispute was concerning the *ownership of land*, the practice was, for the party who claimed, to prove by witnesses, before the hundred or county court, the deed under which he claimed[1]. If the defendant or possessor could prove by witnesses a subsequent title by gift or sale, he of course had judgment; but if he could not prove any such title, but still denied the title of the demandant, or set up any other title in himself, it was the practice in such case for the judges of the court to call on the defendant to produce a definite number of cojurors, who would, on their oath, declare that what the defendant affirmed was true. If the cojurors took the requisite oath, the court pronounced judgment in his favour; but if he could not produce the requisite number of cojurors, the demandant had judgment for the land, and was put into possession by the sheriff or eorl[2]. Every one will recognise in the office of these cojurors the rudiments of the institution of trial by jury; and it is obvious, that but for the violent convulsions which took place in the judicial polity of the Francs, under the Capetian race, that England would not have been the only nation which would have had to

[1] V. Hist. Eliens. c. xxxv. p. 479.

[2] V. Hist. Eliens. c. xliv. p. 484.; ibid. c. xlv.

boast of this celebrated and admirable institution[1].

The method of defence, *by ordeal* and *by battle*, both of which were a species of divination or attempt to discover the judgment of God on a doubtful matter, was modelled by the Barbarians into a regular system.

Trial by ordeal.

The nature of proof by ordeal has been so frequently explained, that I forbear entering into any detail in regard to its nature[2]. This mode of proof was not of Barbarian original, it was introduced by the Christian clergy from the Jewish law[3], in the hope that, as it depended upon the same principle, namely, a supposed special interference of the Deity, it might be made to supersede the sanguinary method of trial by judicial combat. Amongst the Salic Francs, the

[1] Ante, p. 465. The Abbé Mably, speaking of the Scabini, Rachimburgii, and Sagibarones of the Francs, and other continental nations, remarks, "qu'ils faisoient à peu pres les memes fonctions que les jurés font aujourd'hui en Engleterre." The scabini, however, performed the functions of the *judices* of the Anglo-Saxons, not of *jurymen*.

[2] A clear and accurate account of purgation by ordeal, as practised in England, may be found in Dr. Lingard's first volume, p. 493-5.

[3] See Numbers, chap. v. verse 21. et seq.; Exodus, chap. xxxviii. verse 8. Uxor Ebraica, lib. iii. c. 15. et Conf. Formul. Exorcismorum, Edit. Lindenb. p. 1299. to 1310. et Gloss. p. 1354.; et v. Greg. Turon, lib. v. c. 14.

clergy so far succeeded, as to obtain the enactment of a positive legal prohibition of trial by battle, though, as noticed below, it was constantly resorted to in practice [1].

Trial by battle was originally resorted to in cases of suspicion, where there was no positive testimony; at first the battle was always fought between the parties themselves [2]: afterwards champions were introduced [3]. The cases that are noticed in the codes, which were decided by battle between the parties themselves or their champions, are charges of treason [4], cases where a man's freedom was called in question [5], charges of murder, adultery, incendiary, witchcraft, theft, and the like [6],

Trial by battle.

Between the parties or champions.

[1] That the Francs in general commonly resorted to trial by battle, is plain from Gregory of Tours. See Greg. Turon. lib. x. c. 10. &c.

[2] "Jungamus ad prælium —a Domino judicemur." Chron. Fredegar. c. 35. A. D. 604.

[3] "Une trop mauvese cousture," says Beaumanoir, "souloit courre *anchiennement*, si comme nous avons entendu des seigneurs de lois, car-li aucuns si louoient campions, en tele maniere que il se devoient combatre pour toutes les querelles que il aroient a fere ou bonnes ou mauveses," p. 203.

[4] Leg. Alam. tit. 44. § 1. and 2. Leg. Bavar. tit. 2. c. 1. § 2. Leg. Long. i. 1. § 7.

[5] Leg. Rip. tit. 57. c. 2.; ib. tit. 67. Leg. Bavar. tit. 15. c. 11. Leg. Long. ii. 35. § 4. and 5.

[6] Leg. Alam. tit. 80. Bavar. tit. 12. § 8. Decret. Tassilon. 1. § 10. Leg. Long. i. 9. § 23.; ib. 1. 25. § 51.; ib. 1. 32. 3. 11. 55. 16.

or questions as to the ownership of allodial land and of dower, and disputes as to boundaries, and some others of a like nature [1].

Between a party and a witness.

Battle also was permitted between *a party* and *a witness*. The party who sought to invalidate the testimony of a witness who was brought against him, was bound, when the witness was about to put his hand on the altar, or other sacred thing, to prevent the witness from giving testimony by removing his hand; he must then charge him with being a liar, and offer to prove his assertion by battle; in such case, a judicial combat was awarded between the party and the witness [2]. The Burgundians, if the text of their law has not been corrupted, allowed the plaintiff to challenge even the compurgators or cojurors of his adversary [3]. If there were more than one witness to the same fact, one of them was chosen by lot to fight with the defendant; if he were conquered,

[1] Leg. Fris. tit. 15. Leg. Alam. tit. 56.; ibid. tit. 88. Leg. Bavar. tit. 11. § 5. et seq. Leg. Long. ii. 35. § 2. 4. and 5.

[2] Leg. Bavar. tit. 16. But the Bavarians would not allow the witnesses to a debt to be challenged to fight; ib. § 2.; Leg. Ripuar. tit. 59. subject even *the notary* to be challenged to fight in support of instruments of sale drawn up by him. Et V. Leg. Burg. tit. 45.

[3] Conf. Leg. Burg. tit. 8. § 1.; ibid. tit. 45.; but the reason mentioned in the latter, "quoniam justum est ut si quis veritatem rei incunctanter scire se dixerit et obtulerit sacramentum pugnare non dubitet," is not applicable to compurgators.

all his companions who had offered to swear by the same facts, were punished as convicted of perjury[1]. By a capitulary of Louis the Pious, it was ordained that where there were several witnesses on both sides, one from each side should be selected to fight: the event of the battle decided the cause, and the witnesses on the vanquished side had their hands cut off, unless they could redeem them. One can scarcely believe that so absurd and abominable a law should have found its way into any judicial system[2].—No trace of *trial* by battle is to be found in the Anglo-Saxon annals.

According to the regular established practice as to judicial combats, the combatants were bound to fight before the king or the viceroy, or a person appointed by them for the purpose; and it was the duty of the judge, on every challenge, to take securities from each of the parties, for their appearance by themselves or their champions, in some cases within fourteen, in others within forty nights from the time of the challenge[3]. Previously to the battle, the combatants were examined most cautiously, to discover if they had any magical herbs or spells about them[4].

[1] See the preceding references; and Leg. Burgund. tit. 16. et seq.

[2] Capit. Lud. Pii, A. D. 819. § 10. Baluze, to. i. p. 611. et seq. p. 780. and 871.

[3] Leg. Ripuar. ubi supra.

[4] Decret. Tasselon. Leg. Pop. § 5. Leg. Long. ii. 55.

According to the received interpretation of the Salic law, that law, contrary to the law of the Ripuarians, absolutely forbade trial by battle[1]; ordeal was substituted in its place[2]. But, notwithstanding this legal prohibition, it is evident that controversies of every kind were decided by single combats very generally throughout the whole Francic nation[3].

Rotharis, king of the Lombards, attempted to stifle this singular custom among the Lombards, and to establish proof by compurgation in its stead; he designates trial by battle as grievous, impious, and absurd[4]. Grimoald was daring,

11. Beaumanoir, p. 330. enters particularly into the subject of spells. Gregory of Tours, lib. iv. c. 29. evinces some degree of credulity as to magical spells and incantations.

[1] Montesquieu, liv. xxviii. c. 15. thinks that this prohibition resulted from the system of proof which prevailed in the Salic, as distinguished from the Ripuarian law, namely, that in the former the plaintiff was bound to prove his case; and that done, the defendant was not allowed, as in the Ripuarian law, to bring negative proof by compurgation. But it appears to me, that the true reason was, that amongst the Salic Franes, the clergy had influence sufficient to procure the substitution of ordeal.

[2] Leg. Sal. tit. 55. Decret. Child. § 6. Ducange, voce *Farfalium*, and the notes of the editors.

[3] Gibbon's Decline and Fall. It may be remarked, too, that Gregory of Tours never notices any distinction in this respect amongst the different tribes of Franes, though he constantly mentions the prevalence of the practice. *Ante*, p. 479.

[4] Leg. Long. l. ii. 55. §§ 1. 2. and 3. "Quia incerti sumus

enough to suppose that a man might be accused of theft, fight, be conquered, and yet be innocent [1]. However, the above-mentioned kings, and their successor Luitprand, finding the custom too deeply rooted to be eradicated, were compelled to content themselves with introducing some salutary laws for its regulation. Accordingly, in many important questions, both civil and criminal, enumerated in the Lombard code, which questions it is to be presumed were those which were of most frequent occurrence, if the defendant could clear himself by the requisite number of compurgators, generally twelve, he could not be compelled to fight [2]. Battle was only allowed in cases of suspicion of theft, incendiary, or the like, where no proof could be obtained; and in all cases the challenger was bound to swear that it was not through malice or with an evil intent that he laid the charge, but because he had just

de judicio Dei, et multos audivimus per pugnam sine justa causa suam causam perdere, sed propter consuetudinem gentis nostræ Longobredæ legem impiam vetare non possumus." Leg. Long. i. 9. 23.

[1] Ibid. i. 25. § 51. Beaumanoir, who treats so largely on trial by battle, and in whose time even *interlocutory* questions were decided by battle, says almost the same, p. 314.

[2] Leg. Long. 11. 55. 1. et seq. "Quia absurdum et impossibile videtur esse," adds the law, "ut tam grandis causa sub imo gesto per pugnam dirimatur." However, the emperor Otho, at the request of his subjects, restored the ancient method of decid-

grounds of suspicion[1]. And, with a view to tempt their subjects to resort to proof by compurgation, many laws were enacted under the latter Lombard sovereigns for regulating that mode of proof, and rendering it more certain and satisfactory. It would seem that in the time of Charlemagne many persons in his empire were induced to entertain doubts as to the decisions which were obtained by means of the judgment of God; to silence these doubts, the emperor and his council enacted, that "omnes judicio Dei *credant absque dubitatione*[2]."

The judicial institutions of the Visigoths very narrowly followed those of the Romans[3]. I have therefore not thought it necessary to detail them.

The severest penalties were pronounced against extortion and corruption on the part of those who were intrusted with judicial situations[4]; and to prevent the perversion of justice by the propensity of all ranks to drunkenness, the count and judges were latterly forbidden to sit in judgment unless fasting[5]. The count was particularly di-

ing these questions by single combat. Leg. Long. ii. 55. § 34. 35. et seq.

[1] Long. ii. 55. 15.

[2] Cap. Car. Mag. A. D. 809. § 20.

[3] V. Leg. Vis. lib. ii. tit. 1. 2. 3. and 4.

[4] Prol. Leg. Burg. Leg. Bavar. tit. 2. § 16. Vis. ii. 1. 20. and 25. lib. vii. tit. 4. &c.

[5] Long. ii. 54. 4. and 11. Capit. Leg. Sal. addit. c. 1. § 15. The same law forbids the suitors to come drunk into court; and the succeeding law forbids any one from drinking more than he re-

rected to be the defender and protector of widows and orphans; and all who were invested with judicial authority were commended to be just but merciful, tempering the rigour of the law in favour of the poor and depressed [1].

quired: "Diem noctemque continuare potando nulli probrum." Tac. de Mor. Germ. c. 22.

[1] Formul. ed. Lind. 32. Leg. Vis. xxii. 1. 1. Long. ii. 43. 2. Bavar. tit. 7. c. 7. &c.

CHAPTER XXIV.

NATIONAL COUNCILS OR GENERAL ASSEMBLIES.

FIRST.—*AMONGST THE FRANCS AND OTHER CONTINENTAL NATIONS.*

At the time when the Barbarians compiled their codes, the same councils and assemblies were held as when Tacitus described the manners of their ancestors. The assembly in which the chiefs consulted as to the affairs of minor importance, may be recognised in the council or court of the king's palace[1], which has already been mentioned. The Barbarians had also their general assemblies, where momentous affairs, such as the adoption or framing of laws, were debated and decided upon.

So long as the Barbarians constituted an army, and continued to be under military discipline, and remained distinct from the inhabitants of the

[1] Curia Regis, *ante*, p. 282.

conquered countries, as they might at any time, of course, be assembled together for the purpose of military expeditions, so they might be collected together in general assembly, to deliberate for the general good [1]. Accordingly, during the reign of Clovis and his immediate successors, the whole body of the Francs were convened in council pretty generally once a year. These meetings, from the time at which they were held, were denominated the Campus Martius. At these assemblies, the ancient form of deliberation appears to have been adhered to [2]; the measure was proposed and discussed by the king, dignified ecclesiastics, and persons in authority; it was adopted or rejected by the voice of the people at large [3]. But it is obvious that this

[1] The army of Clovis is supposed not to have originally exceeded 5000 men.

[2] Greg. Turon. ii. c. 27. Childeb. § 8. Et v. Leg. Alam. § 3.

[3] "CONSULTANT DE MAJORIBUS OMNES." Tac. de Mor. Germ. c. 11. The following authorities appear to me to shew that the same practice was continued by the Francs and their tributaries, under the Merovingian kings; "Decretum est apud regem, et principes ejus, et *apud cunctum populum Christianum* qui infra regnum Merivingorum consistunt." "Quia sic convenit duci et *omni populo* in publico concilio." Leg. Alam. tit. 41. § 3. The general preface to the laws of the *Bavarians, Alemans,* and *Ripuarians,* in Lindenbroc and in Baluze, tom. i. p. 26. The preface to the laws of Alemans prefixed by Clotaire, Lindenbroc, p. 362; and the 1st section of Decret. Tassolinis de Pop. Leg. edit. Lindenb. are to the same effect.

could not long continue; the Barbarians would settle with their families in the country where they had their land, from whence they would be unwilling to travel to a distant part of the kingdom to deliberate as to affairs in which they had no individual interest. In process of time, too, the

In the time of Charlemagne, also, we find laws mentioned to be promulgated *omni consensu*. Leg. Longob. iii. tit. 31. de Capit. Leg. Salicæ Additis; et v. Hincmar. de Ord. Pal. c. 35, cited by Mably, Observat. tom. i. p. 381. Et Ibid. 382. and 383. Tacitus adds, "ITA TAMEN UT EA QUOQUE QUORUM PENES PLEBEM ARBITRIUM EST, APUD PRINCIPES PERTRACTENTUR." Tac. de Mor. Germ. ubi sup. et v. *ante*, p. 220. The following authorities appear to me to shew that this form of deliberation and determination was also continued among the Francs and their tributaries during the first race: "Childebertus rex Francorum vir illustris. Cum in Dei nomine nos omnes Kal. Mart. de *quibuscunque conditionibus* una cum nostris *optimatibus pertractavimus*. 3°. In sequente hoc convenit *una cum leudis nostris* ut nullus de crinosis incestum," &c. Decret. Child. § 1. Baluze, to. i. p. 18. "Confirmatio legis a regibus, quam Clodovæus, rex Francorum, statuit et postea una cum Francis *per*tractavit. Inde vero Childebertus post multum tempus tractavit ut quicquod invenire potuerit ibi cum suis Francis adderet. Clotharius similiter cum regni sui *sapientibus* invenit ut a tit. 83. adderet, et ita perfectum perduxit." § ult. ejusdem Decret. The following is still more express in regard to the practice in the dukedom of Bavaria: "Insuper gentis suæ institutiones legum per *primates* imperii, universa *consentiente multitudine*: quæ reperit diuturnitate vitiata, et quæ videbantur abstrahenda evelleret." et v. rel. Prolog. Decret. Tassilonis Duc. Baiaorum; dat. A. D. 772.

increase in numbers, and the subdivisions of the portions of the first settlers by sale and descent, would have rendered the assembling of the whole body of freemen nearly impossible, and, for the purposes of deliberation, utterly useless. The great mass of the Barbarians, therefore, as the Roman people had done before them, ceased, as by common consent, to attend at the general assemblies, which attendance perhaps was never compulsory, and left the administration of the affairs of the nation to the king and the nobles. Under the grandsons of Clovis, the people were seldom convoked to the general assemblies[1]. From the time of Charles Martel until the reign of Charlemagne, the people were never assembled; but the optimates or proceres, that is, the dignified ecclesiastics, the counts, and antrustions, were alone summoned to these assemblies. The time of holding these assemblies, so constituted of the proceres alone, having, in the time of Pepin, become uncertain, he ordained that they should be held twice a year, in May and in the autumn[2]. Charlemagne, as I have before observed, in the year 807, regulated the military service to be exacted from the freemen of the nation, by

[1] Mably, Observat. sur l'Histoire de France, tom. i. p. 40, &c.

[2] Mascou, Hist. of the Germans, book xiv. c. 36. Mably, Observations, &c. tom. i. p. 131, &c.

ordaining that no one who possessed less than three mansi should be compelled himself to serve in the army; and that those who had less, down to half a mansus, or six acres, should send one amongst them for every three mansi, according to certain fixed regulations[1]. The Emperor Louis, in the year 819, adopted the same principle in regard to the attendance of the people at the assemblies of the nation, which, like his grandfather Pepin, he appears to have desired to make a permanent establishment[2]. He directed that the count should bring with him to the general assembly, twelve *scabini* or assessors, who, as has been already mentioned, were chosen by the freemen assembled at the county court. If there were not that number of assessors in the county, the count was to make up the number with the worthiest of its free inhabitants[3]. The count was also to bring with him the advocates or civil representatives of the clergy. The assemblies so constituted were continued during the reign of Louis and the early part of that of Charles the Bald[4]; but,

[1] "Quicunque liber homo mansos quinque de proprietate habere videtur, in hostem veniat: et qui quatuor mansos similiter faciat; qui tres habere videtur similiter agat." &c. Capit. Ann. 807, art. 2. Et v. *ante*, p. 320.

[2] Capit. Lud. Pii. Baluze, tom. i. p. 606. A. D. 819.

[3] Baluze, tom. i. p. 647, Ibid. tom. ii. p. 54. 96. 141. and 146.

[4] Mably, Observations, tom. i. p. 204.

from the reign of this monarch, the holding of general assemblies fell generally into disuse in the Francic as well as the Germanic empire.

The chief business of the general assembly was the revising the laws of the land [1]. Persons not members of the assembly were at liberty, after the mode in use amongst the Roman provincials [2], to petition for an alteration in the laws; and when the petition was acceded to, the law was drawn up in the form of an answer to such petitions, much in the same way as an English act of parliament is now framed [3]. The greatest care was taken that every man should be made acquainted with and understand the laws which were made and confirmed at these assemblies [4]; and it was for this

[1] Cap. Car. Mag. Baluze, tom. i. p. 356. "Generaliter omnes admonemus ut capitula quæ præterito anno legi Salicæ cum *omnium consensu* addenda esse censuimus—pro Lege Salica putantur." Et v. ibid. p. 410. 414. 647. 671. et tom. ii. p. 54. which also shew that the capitularies were confirmed at the general assemblies.

[2] V. *ante*, p. 61.

[3] Baluze, to. i. p. 410.

[4] "Volumus etiam ut capitula quæ nunc et alio tempore *consultu nostrorum fidelium* a nobis constituta sunt, unusquisque per suam diœcesim cæteris episcopis, abbatibus, comitibus, et aliis fidelibus nostris ea transcribi faciant, et in suis comitatibus coram omnibus relegant, ut *cunctis nostra ordinatio et voluntas nota fieri possit.*" Capit. Ann. 823. § 24. Et v. ibid. A. D. 824. Baluze, to. i. p. 644. See also Mably, Observat. &c. to. i. p. 137. p. 204. and the authorities cited p. 385. The same principle, it will be recollected, prevailed amongst the Romans, in every period of their history.

purpose, probably, that the prerogative of causing the laws, after they had been enacted, to be published throughout the kingdom, in the form of a royal edict framed on the model of a Roman imperial constitution, was conferred on the Barbarian sovereigns [1]. These edicts being the records which have been handed down to us, have led many writers to suppose that the laws of the Barbarians emanated from the royal authority alone. The *language* of these edicts might, indeed, warrant this conclusion; but it is clear from an examination of the authorities cited in this chapter, that, in using the expressions above referred to, the sovereign, to whom the executive power was committed, willed, ordained, and commanded, only because the national council had ordained and commanded; nor is it surprising that this language should have been used amongst the Francs, the edicts, as the language in which they are written would import, having been drawn up by the clergy attendant on the court, who would naturally use the form of expression which had become familiar to them in the study of the Theodosian code, then considered the perfection of reason in the way of legislation.

[1] *Ante*, p. 263.

SECONDLY.—*AMONGST THE ANGLO-SAXONS AND ANGLO-NORMANS.*

King's court in the time of the heptarchy.

Few authentic records exist relating to the early Anglo-Saxon history, and it is impossible perhaps to ascertain with precision what was the constitution of the councils which were held during the heptarchy; but there is no reason to doubt that the kings collected around them, at regular intervals, as a matter of state, the counts or ealdormen, the military commanders, and the great landed proprietors holding the rank of king's thanes, and who represented the *comites* of the ancient German princes. Indeed it was necessary that some such assemblage should be held to determine the appeals brought from the decisions of the ordinary tribunals throughout the kingdom, and to decide the controversies arising amongst the great men or proceres of the nation [1].

Wittenagemot in the time of the heptarchy.

The practice of assembling the whole body of thanes or freeholders, when any measure was to be decided upon which concerned the nation at large, appears also to have been continued [2]; in-

[1] The king's Sele, *regis tribunal*, is mentioned in the laws of Lothair and Edric, § 7. A. D. 675-85.

[2] The second law of Ethelbert, who reigned A. D. 561 to 616, commences thus: "Si rex *populum* suum ad se vocaverit." That the people on great occasions met in council, appears from the following passage of Henry of Huntingdon: "Sigebertus rex in principio secundi anni regni sui

deed, when the most important and usual subjects for deliberation, namely, the undertaking a hostile expedition, or the making peace with an enemy, were to be decided upon, the freemen would already be collected as an army, and the councils would be held in their presence. Still, however, according to the ancient custom, the measures appear to have been discussed, and the statutes made by the king and the chiefs or elders of the nation [1].

Courts of state and wittenagemots after the union of the heptarchy.

From the time of the union of the several kingdoms under Egbert, in 827, it appears that the kings continued regularly to hold their courts of state [2], and to convene general assemblies when

cum incorrigibilis superbiæ et nequitiæ esset, congregati sunt proceres *et populus* totius regni, et provida deliberatione et unanimi consensu omnium expulsus est a regno. Kinwlf vero juvenis egregius de regia stirpe oriundus electus est in regem." Hen. Huntingd. lib. iv. Scrip. post Bed. p. 342. et v. Spelman Concil. to. i. p. 126. temp. Ethelberti. ib. p. 219. temp. Inæ, and Petyt's Ancient Rights of the Commons in Præfat.

[1] The preamble to the laws of Wihtred is to the following effect: "Mitissimi Cantuariæ regis Wihtrædi regnantis quinto anno regni, (A.D. 696,) indictione nona, die 6. Augusti, in loco qui vocatur Berghamstede, congregatum fuit optimorum procerum consilium —Ibi *optimates* illi, *omnium assensu*, hæc *fecerunt* judicia, et justis Cantuariæ institutis adjunxerunt." Et v. Prol. in Leg. Lothar. et Edric. et v. Leg. Inæ, Wilk. p. 14.

[2] Henry of Huntingdon, in Scrip. post Bedam, states that the curia of the Anglo-Saxon monarchs was the ornament of the royal state, and that it was held from all antiquity, p. 390-5. Bromton bears similar testimony as to its antiquity, p. 996. 8.

any measure required to be adopted which concerned "universæ gentis *utilitatem*[1]."

The whole body of freeholders continued to attend the great councils on momentous occasions[2] even after the union of the Saxon kingdoms under Egbert. Indeed down to the time when Canute obtained the crown, the freeholders at large were continually assembled in arms, to repel the Danish invaders, and might therefore readily be convened in council.

But from the time of the union of the Anglo-Saxon monarchies, the same circumstances operated in England as in France to prevent the possibility of assembling the whole body of freeholders, either to join the army, or attend the councils of the nation; and accordingly, the obligation of personal attendance in the army, as we have seen, was in the time of Edward the Confessor in most parts of England restricted to those who were the

[1] V. int. alia, Chron. Sax. p. 136. 140.

[2] Thus Ingulphus mentions, that at a council held A. D. 855, there were present, besides the proceres, "aliorum fidelium *infinita multitudo*;" p. 863. 2. Other similar expressions might be cited from Hoveden and Knyghton. The following preamble is prefixed to the treaty made between Alfred and one of the Danish chieftains: "Hoc est fœdus quod Alfridus rex et Gythrun rex et totius Angliæ nationis sapientes (witan) et *omnis gens* quæ in Anglia orientali habitat *fecerunt*." Wilkins, p. 47. These expressions, "infinita multitudo," and "omnis gens," cannot but refer to the freeholders at large.

owners of five hydes, as it was in the Francic empire to the owners of three mansi [1]. It is obvious, that in that age it would be difficult, even for the owner of three mansi or five hydes, to provide himself with the means of leaving a remote part of the kingdom to join the army. Charlemagne, in order to remedy this inconvenience, still further limited the obligation of personal service in favour of the Frisons [2]; but it was not until the time of King John, that a similar limitation of personal service was obtained in favour of the milites or freeholders of England [3].

The same inconvenience would of course operate to prevent the attendance of the freeholders at the wittenagemots, or parliaments [4]; and accordingly, the general tenor of the later Anglo-Saxon [5], Anglo-

[1] V. *ante*, p. 320.

[2] Capit Car. Magn. A. D. 607. Baluze, to. i p. 460.

[3] "Provisum est communi assensu archiepisc. episc. comit. baronum et omnium fidelium nostrorum Angliæ quod *novem* milites per totam Angliam invenient *decimam* militem bene paratum equis et armis ad defensionem regni nostri, et quod illi novem milites invenient decimo militi qualibet die 2 sol. ad liberationem suam." Rymer, Fœd. to. i. p. 92. new edit. Cal. Rot. Pat. p. 2.; but this limitation of service was departed from on pressing occasions. V. Rot. Claus. 38 Hen. III. m. 13. in dorso. Append. to Lords' Rep. p. 13.

[4] It is stated in the preamble to the 34th law of Athelstan, "Totum hoc institutum est et confirmatum in magno synodo apud Greattayam cui interfuit Archiep. Wilfinus et omnes sapientes quos Adelstanus rex *potuit* congregare." Bromton, p. 845.

[5] "Rex Anglorum Egelre-

Danish, and early Anglo-Norman [1] records shows that from the time of Egbert, and more especially from the time of Athelstan, it became the custom

dus, A. D. 1002, habito consilio cum regni sui primatibus," Hoveden, p. 429. et v. p. 436. as to the concilium called by Canute, at which he was *elected* king. Knyghton, who calls the concilia of the Anglo-Saxons parliamenta, mentions *proceres* only as present, p. 2317-8. temp. Canut. p. 2331. temp. Edw. Confess. Et v. Diceto Abbrev. 467. 35. temp. Cnut. &c. Bromt. 866, 50. temp. Edgar. 937. 28. 40. 50. temp. Alfred. Numerous similar instances might be cited. The royal grants are generally mentioned to have been made consilio *nobilium* et *optimatum*, or *principum* only, v. int. alia, Chron. Thorn. p. 1762. temp. Ethelb.; ib. p. 2128. temp. Ed. Confess. &c.

[1] The following authorities will show the general style of the expression on the subject of the national councils in the early Norman reigns:— "Comites et barones totius Angliæ apud Salisberiam convenerunt." Hoveden, ad A. D. 1121, p. 473. "Stephanus rex, episcopos et proceres regni sui regali edicto in unum convenire præcepit; cum quibus hoc generale concilium celebravit," Hagulstad, apud X. scriptores, p. 314. "Ipse vero rex," says Bromton, ad A. D. 1176, "archiepiscopis, episcopis, comitibus, et sapientoribus regni sui in urbe Londonia congregatis." Bromton also mentions, ad A. D. 1177, that Henry II. "magnum concilium celebravit cum episcopis, comitibus, et baronibus regni." The carta forestæ obtained by the parliament from Henry III. c. 10. gives the privilege of killing *a deer or two* to the archbishops, bishops, earls, and barons, in going to and returning from the king in obedience to his summons, which affords strong presumption that they were still the only persons who were members of the parliaments. So at the parliament held at Merton, 20 Hen. III. c. 9. it is recorded that, "Omnes *comites* et *barones* responderunt," &c.

to summon the *proceres*[1] only to attend the wittenagemots or parliaments.

Union of the wittenagemot with the curia regis.

As soon as it became the established custom to summon the proceres or magnates alone to the wittenagemot, each of these councils being attended by the same class of persons[2], the distinction between the curia regis and the wittenagemot began to wear away.

The curia regis still continued to be held, as of course, at the three great feasts of Christmas, Easter, and Whitsuntide[3]; and as the same persons attended the curia regis as were summoned to the council of the nation, the business of the nation, when the urgency of affairs required it, was transacted at the curia held de more, in the same manner as at the national councils[4]. Hence the

[1] They are indifferently called magnates, optimates, principes, and proceres in the early records. There is a writ extant of the 3d year of Edward II. Petyt [16], in which the term magnates is extended to *milites*; the right of this class of persons to send representatives to parliament was then established.

[2] That all the optimates were members of the curia regis, appears from Hist. Eliens. c. xxvii. Gale, p. 505. and many other authorities.

[3] Vide Chron. Sax. p. 190, as to the custom in the reign of William the Conqueror.

[4] The following passages from Eadmer plainly show that during the reigns of the early Anglo-Norman sovereigns this was universally the case: "Cum igitur in Pentecoste festivitatis gratia *regiæ curiæ* se præsentasset Anselmus, &c. Peractis igitur festivioribus diebus diversorum negotiorum causæ in medium duci extunc cœperunt," p. 37. temp. Will. II. "In

extraordinary councils came to obtain the name of *curiæ*. During the later Anglo-Saxon and early Anglo-Norman reigns I can find no solid distinction between the functions of the curia regis and the concilium regni [1]. When *summonses* were sent to the proceres, requiring their attendance at the curia regis for the despatch of business, the court so held would be, to all intents, the same as a consilium or parliament. The curia regis and concilium regni the more readily became identified, as there was no business brought before the curia regis which was not from all time equally transacted at the general councils [2].

subsequenti festivitate Pentecostes rex Henricus curiam suam Londoniæ in magna mundi gloria, et diviti apparatu celebravit. Qui transactis coronæ suæ festivioribus diebus cœpit agere cum episcopis et regni principibus quid esset agendum," &c. ib. p. 102. temp. Hen. I. et v. ibid. p. 21. "*Prisci moris* fuit," says Florence of Worcester, "ut magnates Angliæ ad natale Domini ad curiam regis convenerint, tam ad festivitatem celebrandam, tam ad obsequium regi præstandum, et *de negotiis regni deliberandum.*"

[1] Knyghton uses these terms as synonimous, p. 2331, 41. 43. 52. Gervas, p. 1377. ad A. D. 1154. temp. Hen. II. uses the word curia in the same sense as consilium. And see Eadmer, p. 39, 7. temp. Will. II. See also Cart. Steph. regis de possess. Episc. Bathonensis, Rymer's Fœd. to. i. p. 16. Matthew Paris constantly uses the words curia regis to denote a general council, p. 272, A. D. 1225, &c. 325, 54. A. D. 1233, 272. A. D. 1225, &c. In the preamble to the statutes of Merton, temp. Hen. III. A. D. 1235, the parliament is still called curia regis.

[2] V. int. alia, *ante*, p. 283.

Classes of persons who were the ordinary members of the wittenagemot.

The proceres then being the only persons who were *usually* summoned to the national assemblies or wittenagemots during the latter period of the Anglo-Saxon history, and during the reigns of the early Norman monarchs, it is material to examine of what classes of persons the proceres were composed.

Dignified clergy.

The two archbishops, and all the bishops, abbots, and priors in the kingdom, were ranked amongst the proceres, and were members of the courts de more and of the wittenagemot.

Heretochs or duces.

The duces, or military commanders, who, after the counts had obtained the title of eorls, were generally denominated ealdormen[1], frequently also heretogas and heah gerefas[2], were also ranked amongst the proceres, and were members of these assemblies[3].

[1] It would appear, from the expression cognomento ealdorman, Hist. Eliens. c. xxx. Gale. p. 507. that this title was sometimes enjoyed as an honorary distinction merely.

[2] *Duces*. Ingulph. ad A. D. 855, p. 863, &c. Bede Hist. Eccles. passim. *Ealdormen*, Chron. Sax. p. 127. 146. &c. Alfred's translation of Bede, passim. *Heretogas*, ibid. p. 133. &c. *heah gerefas*, ibid. p. 132. &c.

[3] That there were military commanders, or *duces* (such as Eadric, ealdorman, general of Ethelred, Chron. Sax. p. 146. Ealfric, ealdorman or heretoga, also general of Ethelred, ib. p. 133.), distinct from the eorls or counts, is apparent from the Saxon Chronicle, p. 127. From the same document, p. 133. it would appear that they were appointed as occasion required to the supreme command of an army, as lieutenants of the king. However, we are not always to understand that the term *duces*,

The counts or eorls formed another class of the proceres, and were members as well of the courts de more as of the wittenagemots. Counts or eorls.

The only remaining class of persons who were included under the denomination of proceres, were the king's thanes, or, as they were called under the Normans, first, the greater barons, afterwards the barons. There is much uncertainty as to the nature of the dignity enjoyed by this important class of persons, the stock of the British nobility; but it is highly probable, that the king's thanes in England were constituted in the same manner as the an- King's thanes or barons.

so frequently to be found in Ingulphus, Bromton, Knyghton, and the other Anglo-Saxon annalists (see the quotations, Turner's Anglo-Sax. iv. p. 276.) is intended to designate military commanders only; it is plain that in many cases this title is given to the counts or eorls who were the ordinary military, as well as civil chiefs of the counties over which they presided. Thus dux and comes are sometimes used as synonimous by Knyghton, v. int. alia, p. 2333, 47; and in the attestations to the charters granted at the wittenagemots, there is frequently no other name but that of duces, under which the eorls, the constant attendants of these assemblies, could be included. See Astle's Charters, No. 12. Turner, ubi sup. I may here remark, that the section in the treatise called the Laws of Edward, published in Wilkins's Collection, p. 205. et seq. as to the election of the chiefs of counties there called heretogas and gerefas, at the county court, is so completely at variance with the annals of the times, that I have assumed that it relates to what was the original practice of the Anglo-Saxons; it cannot have been the practice in the time of Edward the Confessor.

trustions amongst the continental nations: namely, that when the individual, who was to be elevated to this dignity, already owned sufficient lands to qualify him for the appointment [1], he was permitted to commend himself and his possessions to the king as his patron, thereby converting his lands into a royal honour, to which the right of territorial jurisdiction would immediately attach; and that when an individual not possessing the requisite quantity of land was to be so elevated, a royal honour, part of the king's demesnes was granted to him, with the usual and probably universal concomitant of territorial jurisdiction, then denominated the privilege of sac and soc, thol and theam, infangthef, and utfangthef, &c. It is highly probable that the right of *unlimited* territorial jurisdiction [2] comprised under these barbarous expressions, or as it was called in France, the privilege of *haute justice*, to the exclusion of the count or eorl, coupled with holding directly of the crown, or, as it is called *in capite*, and which appears to have conferred on the person enjoying such privilege the title of *hlaford*, was the distinguishing characteristic of the proceres of the nation [3].

[1] Namely, 40 hides, v. ante, p. 311.

[2] See Hume's 1st Appendix. The numerous grants from the crown to cathedral churches and abbies, which are to be found in Thorn and the other early writers, contain the privilege of *sac, soc*, &c. almost universally.

[3] The 12th and 14th sections of the laws of Canute,

The king's gerefas, or civil chiefs of counties under the eorl, and the port gerefas of London and the other principal towns belonging to the king, all of whom held their offices at the pleasure of the king[1], and also the officers of the king's household[2], would in all probability be selected from the class of king's thanes, and as such would be members of the wittenagemot; but there is no evidence to show that they were summoned in virtue of their respective offices. Gerefas, &c.

However, even from the time when the whole body of thanes or milites ceased to attend on ordinary occasions, on those emergencies when an assembly was required to be convened to decide on any measure which was likely to affect the immediate interests of each individual, and especially when it was to be followed by a subsidy or contribution[3], it is probable that, in the time of the An- Whole body of thanes or milites holding of the king continued to be summoned on momentous occasions.

Wilk. 135. the 20th and 25th sections of the treatise entitled the Laws of Henry I. Wilk. p. 146-7. though not very explicit, or in some parts intelligible, appear to me on the whole to favour this supposition. The language of Rot. Pat. 44 Hen. III. m. 2. seems to imply that at that time the proceres or magnates universally enjoyed the right of territorial jurisdiction.

[1] V. int. alia, Diceto, p. 605. 30. Bromton, 989.

[2] I understand the terms ministri, satellites, and the like, to be intended to include these officers. See M. S. Claudius, B. 471. Astle's Charters, No. 2. Gale, p. 517. Turner's Anglo-Sax. vol. iv. p. 276.

[3] V. Matt. Par. p. 272, 19. and 23. The edition I refer to is that of MDCLXXXIV. In

glo-Saxons, as is pretty clear was the practice amongst the early Anglo-Norman sovereigns, the whole of the king's tenants in capite, who held to the amount of a knight's fee, and who, as appears from Domesday Book, were not very numerous, were summoned to attend, not indeed

the time of Edward the First, it was the acknowledged law of the land, that *quod omnes tangit ab omnibus approbetur*, Rot. Claus. 23 Ed. I. m. 3.

"Hæc est assisa," says Hoveden, "Domini Regis, (Rich. I.) et hæc sunt præcepta de forestis suis in Anglia facta per assensum et consilium archiepisc. episc. abbat. comitum et militum totius regni sui." Hoveden, p. 784. "Convocati sunt ad eum," says Gervas, ad. A. D. 1157. Temp. Hen. II. "præsules et principes regni Abbates nonnulli aliique inferioris ordinis personæ," p. 1378-9. "Rex Hen. II. Juxta consilium filii sui coram episcopis, comitibus, baronibus, *militibus*, et *aliis hominibus* suis in hoc consentientibus constituit justiciarios in sex partibus regni sui," &c. Apud Northampt. A.D. 1176. Diceto, p. 588. If Fitz Stephen, in Vit. Sancti Thom. is correct, (though he is not fortified in this by other historians), "omnes qui de rege tenebant in capite" were summoned to the council held by Henry II. at Northampton, to judge Becket. Hoveden, ad A.D. 1188, mentions that besides the proceres, "alii multi tam clerici quam laici" were summoned by king Henry II. to the council then held. Matthew Paris mentions that at a Parliament held A. D. 1246, "militiæ generalis universitas" were present, p. 619. The same author states, ad A. D. 1248, "venerunt illic vocati Comes Ricardus, &c. et barones prælecti, cum militibus nonnullis." Ibid. p. 652, 6. The provision in the Magna Charta of king John, "et præterea faciemus summoniri in generali per vicecomites et ballivos nostros omnes illos *qui de nobis tenent in capite*." Stat. of the Realm,

as members, or to join in the deliberation, but in order that they might personally furnish such information as might be required[1], and that the sense of the people in general, in regard to the measure to be decided upon, might be ascertained. Another reason might be, that the result of the deliberations would thus be the more readily promulgated.

Origin of representation of the milites or freeholders.

There is no evidence that the thanes or freeholders amongst the Anglo-Saxons ever attended by representatives. Before the conquest the king's tenants in capite, who held to the extent of five hydes of land, were not perhaps very numerous, though probably they exceeded six hundred and

folio, vol. i. p. 10. coupled with the above cited authorities, seem plainly to show that down to his time the practice prevailed of summoning the milites, probably through the sheriffs, on the occasions mentioned in the text. That the magnates alone *deliberated* on these occasions, appears from Matt. Paris, ad A. D. 1225, p. 272. A. D. 1232, p. 314. A. D. 1237, p. 367, 8. and many similar passages, some of which are set out in a subsequent note.

[1] That persons of all classes were occasionally summoned for such purposes only, appears from Gervas, p. 1411, 62. ad A. D. 1170, Hoveden, p. 642, and the writ in the Appendix to the Lords' Reports, p. 4. temp. 10 Hen. III. William I. also, in the fourth year of his reign, "Concilio baronum suorum fecit summoniri per universos Angliæ comitatus omnes nobiles, sapientes, et sua lege eruditos," to inform him as to the ancient laws of England. Knyghton, p. 2355. Et v. Chron. Sax. p. 194.

fifty, which is stated to have been their number when Domesday was compiled. The origin of the representative system, as regards the milites or freeholders, is perhaps to be traced to William I. This monarch, in the fourth year of his reign, caused delegates to be sent to his council from every county, to *inform* the parliament of the ancient laws of England [1]. The same king, in the fourteenth year of his reign, caused the chief persons from various counties and cities to be summoned, to attend at a parliament held for the discussion of ecclesiastical affairs [2]. This precedent appears to have been followed by John, in the fifteenth year of his reign [3], when he required four milites from each county to be sent to him, to speak with him as to the affairs of the nation; and by

[1] Knyghton, p. 2357. Hoveden, p. 601.

[2] V. Argumentum Anti-normanicum, p. cix. Dugdale's Orig. Jurid. p. 16.

[3] Report of the Lords' Committee on the Marmion Peerage, 1820, p. 60. The writ is in the following terms: "Precipimus quod omnes milites balliæ tuæ, qui summoniti fuerunt esse apud Oxon. ad nos a die omnium sanctorum, in xv. dies venire facies cum armis suis, corpora vero baronum in armis similiter et iv. *discretos milites* de comitatu illuc venire fac. ad nos, ad eundem terminum, *ad loquendum* nobiscum de *negociis regni nostri*." "Eodem modo scribitur omnibus vicecomitibus." Append. to Lords' Reports, p. 2. The clause in Magna Charta for summoning *all the king's tenants in capite* may have been introduced to provide against the arbitrary selection thus left to the sheriffs.

Henry III. in the tenth year of his reign [1], when he desired the sheriffs of several counties to cause four milites to be elected, at the county court, that they might lay before parliament their grievances, relative to the then alleged infractions of Magna Charta by the king's officers. This sovereign also, in the thirty-eighth year of his reign, caused deputies from the milites or freeholders in each county to appear before (*coram*) the parliament then held, in order to procure from them the grant of an aid. No doubt many similar instances occurred, of which the memorials have been lost. The system of representation of the milites having come into use, may serve to explain why the clause in Magna Charta for summoning, through the sheriff, *all* the tenants in capite, not being greater barons [3], was afterwards omitted. It had probably been found more convenient that the tenants in capite, not holding baronies, should send representatives chosen by the county, than attend personally in a body, especially as the

[1] Append. to Lords' Reports, p. 4. The system of representation was obviously known and acted upon for some purposes in the reign of king John. See his charter to the borough of Dunwich. Brady on Boroughs, Append. p. 14.

[2] Rot. Claus. 38 Hen. III. m. 13. Append. to the Reports of the Lords, p. 13.

[3] The omission begins in the charter of 9 Hen. III. It will be remembered, that there is a writ dated the 10 Hen. III. requiring representatives from the milites to be sent to the king. V. supra.

demands for aids, and consequent necessity for summoning the parliament, became from this time much more frequent. I shall presently have occasion to recur to this subject, and to mention the establishment of the representative system, at the end of the reign of this monarch.

Of the introduction of burgesses into parliament, and final establishment of the system of representation.

The comparative insignificance of the Anglo-Saxon towns[1], or burghs[2], and the state of dependance of the inhabitants, renders it improbable, that during the early Anglo-Saxon history, they were ever summoned to attend the general councils; however, in process of time, some royal towns, either by grant, or by prescription, emerged from this state of degradation; and particularly they procured an exemption from the most galling of its badges, namely, that of arbitrary taxation. Such towns contributed a certain proportion only to the *aids*, and other taxes which were raised from the inhabitants of the county at large. Thus it is recorded in Domesday, of Worcester, that "Quando Comitatus geldabat, pro xv. hidis se civitas acquietabat[3];" of Stamford, "Stanford burgum Regis dedit geldum,

[1] See Hume's First Appendix.

[2] "Nous croyons," says Mons. Meyer, in his excellent work, entitled Esprit, &c. des institutions judiciaires des principaux pays de l'Europe, to. i. p. 138, 139. "que bourgeois ne vient pas de burg, chateau, mais de *borg* (or *bork*), garant;" which certainly appears to be a very probable derivation of the words *burgh* and *burgess*.

[3] Gale, p. 767.

T. R. E. pro xii. hund. et dimid. in exercitu et in navigio et in Danegeld;" and of Exeter, "Hæc civitas non geldebat, nisi quando Londonia et Eboracum et Wintonia geldabant, et hoc erat dimid. marc. argenti ad opus militare.—Quando expeditio ibat per terram aut per mare serviebat hæc civitas quantum v. hid. terræ.—Barnestapla (which borough, in the reign of Edward III., insisted, that the right of sending two burgesses to parliament had been granted to them, amongst other privileges, by Athelstan) vero et Lideford et Totnais serviebant quantum ipsa civitas." Some towns, as Calne, procured an exemption from making any compulsory contributions even to Danegelt or to the equipping of naval or military armaments[1]. These privileges would have been nugatory, if the king could have raised taxes from *such* towns at pleasure: we may therefore fairly presume, that they were in some manner consulted before they were made to contribute to any extraordinary aid or tallage; and however improbable it may be, that any such general privilege as was claimed by the burgesses of Barnstaple was granted by Athelstan, it is by no means improbable that that monarch had conceded to them the right of being heard in parliament, before any extraordinary aid or tallage was imposed upon them.

Those royal burghs which had not obtained such immunities appear to have been liable, in

[1] Kelham's Domesday, p. 219. et seq.

early times, to be called on for contributions at the king's pleasure; and whenever an aid was granted by parliament, an arbitrary tallage was imposed on the burgesses [1]. Under the early Norman sovereigns, these tallages were assessed by the royal justiciars on their *iters* [2], and collected by the sheriffs [3]. During the reigns of the early Anglo-Norman sovereigns, particularly from the time of Richard I., charters of liberties and immunities were sold to many royal boroughs [4]; and the rights of the crown, in many boroughs, were let at fee farm to the inhabitants: such, indeed, was the extent of the immunities obtained by the royal boroughs from the time of king John, that he and his successors found it necessary to use the form of solicitation in exacting from the royal boroughs those contributions, which the Anglo-Saxon, and first of the Anglo-Norman [5] sovereigns, excepting in the privileged boroughs above alluded to, demanded as a right [6]. From the language of a writ

[1] M. Paris, p. 566. A. D. 1244.

[2] Mad. Hist. of the Exchequer, vol. i. p. 122.

[3] Ibid. vol. i. p. 694.

[4] See Lords' Committees' Report of 1820, p. 49.

[5] See Hoveden, p. 450, 33, 465, 6. Malmesbury, p. 123. Chron. Sax. ad. A. D. 1086, &c.

[6] "Rex scribit omnibus *burgis* ac *dominicis suis* per totum regnum de ejus suorumque valetudine, de ejus victoriis, et nominatim, &c. Necnon quomodo ipse per manus fratris Will. de Sanct. Audveno recepit literas dom. Papæ de forma relaxationis interdicti Angliæ, pro quo relaxand. enixe eos *rogat* ut ei in præstito *subsidium* præstent." Rot. Pat. page 41.

of the eleventh year of Henry III. [1], it would appear that at this time the parliament claimed the right of being consulted before any tallage was imposed even on the royal burghs and domains; and the proclamation which Henry III. was compelled to issue, in the forty-eighth year of his reign, would imply that none of the royal burghs were then considered liable to *arbitrary* tallages [2].

Down to the twenty-first year of the reign of Henry III., though the milites or freeholders at large were sometimes, as before observed, summoned or permitted to attend, yet the magnates, that is, the bishops, abbots, counts, and barons, alone debated as to the granting of aids, and the decree of the magnates, even in the absence of the milites, was considered sufficient to enable the king to levy the aid so granted from every miles or freeholder in the kingdom. Thus we learn from Matthew Paris, that in the year A. D. 1237, 21 Hen. III., the king sent to all the prelates,

authentic edit. 15 Johan. m. 3, Et v. ib. p. 26. and Rymer's Fœdera, to. i. p. 815.; see also Brady on Boroughs, p. 58. and 66. as to the practice in the reign of Edward I.

[1] Brady on Boroughs, p. 103.

[2] V. Rot. Pat. 48 Hen. III. m. 21. a tergo. "Proclamatio per totum regnum contra suggerent. Regem—exigere *tallagia inconsueta.*" It had been provided by Magna Charta that the *king's barons* should not impose on their vassals any but *the three usual aids.* Stat. of the R. p. 10. of the charters. They were often compelled, in order to raise money for answering the king's demands, to make heavy exactions from their villeins. Sim. Dunelm. 222. Malmsbury, 124. 125. &c.

abbots, and priors, counts and barons of England, to meet him at London "regia negocia tractaturi totum regnum contingentia." The magnates, as Matthew Paris expresses himself, having met, were surprised to find that the negocia they were to deliberate about was the granting an aid, which the king "suppliciter postulavit." After much discussion, a thirtieth of all moveables was granted by the magnates so assembled, to be levied of every person holding a barony, and of every *miles*[1]. Henry III., as before observed, in the thirty-eighth year of his reign, summoned deputies from the milites to grant him an aid. In the forty-eighth year of this reign, the king being then in the power of the earls of Leicester and Gloucester, writs were issued in his name for summoning the representatives from the milites to the parliament then holden; and, in the forty-ninth of his reign, the king being still a prisoner, writs were issued in his name for choosing two milites from each county, and two burghers from the cities of York and Lincoln, and the other burghs throughout England, to attend the parliament about to be held, *tractaturi cum magnatibus*. This is the first authentic notice of any summons to the milites or freeholders and burgesses to join in the deliberations of the parliament to which they were summoned[2].

[1] M. Par. p. 367-8.

[2] Rot. Claus. 49. Hen. III. m. 11. dors. in Scedulâ. Append. to Lords' Reports, p. 34.; et V. Matt. Par. p. 320, 61.

It was not, however, until the reign of Edward I., at the earliest, that the representatives of the milites, but more particularly of the burgesses, can be said to have formed constituent members of the parliament. Before that time, whenever any of their number were summoned to parliament, it was merely to confer as to an aid to be levied from their constituents, or to give information to the parliament on the topics which were the subject of debate[1]. Hence it is, that their having been so summoned, is scarcely noticed by the historians of the times. In the reign of Edward I., however, the burgesses as well as milites began to send representatives to parliament to act as efficient *members*, and to have a deliberative voice as to the levying of aids; they soon obtained a voice as to matters of general legislation. The changes which had taken place at that time, in the distribution of property, led to the necessity of some change in the distribution of political power. The new orders of men who were rising into consequence in the cities and boroughs, could not be treated like the abject dependants of former times: besides, Edward I. was in constant want of money for his foreign wars, and towards the

[1] See Gervas of Tilbury, p. 1410-2. Hoveden mentions that deputies from *all* the towns, *urbes*, in England, were summoned, A. D. 1188, to have an assessment made upon them, p. 642.

latter end of his reign he was induced to believe that it would be an easier and shorter process to obtain grants from the representatives of his cities and boroughs assembled in parliament, than to send his judges through the kingdom to solicit or extort a gift, or tallage, from each city and borough in particular[1].

Assemblage of *people* as petitioners and auditors.

The general assembly of the Anglo-Saxons, of whatever *members* it was composed, if we may judge from the practice of the Anglo-Normans, was held openly before the *people;* not only those who were summoned to attend at its deliberations, but all others who chose to be present. Many would of course attend to prosecute appeals from the inferior tribunals; others would be present for the purpose of presenting petitions[2];

[1] Edin. Rev. No. 69. p. 26. The practice of sending to each burgh separately, was occasionally practised down to 23 Edw. I. See Brady, p. 60. But by statute 24 Edw. I. this king gave up all claim to impose any tallages without the consent of parliament.

[2] Even after the commons were admitted as *members* of Parliament, the enactments made at their instance continued to be framed as answers to petitions presented by them to the king. Introduct. to Stat. of the R. p. lxv. From the *petitions* and the *answers*, "auxi bien a les requestes des grantz come de ceux de la commune et de la clergie," the statutes were drawn up, and after being sealed with the great seal, were then promulgated. Rot. Parliam. to. ii. p. 131. No. 42. &c.

for the redress of grievances [1]; others, and especially those from the neighbourhood, merely with a view to witness the deliberations of the assembly. Under the early Norman, and probably under the Anglo-Saxon sovereigns, the freeholders of the neighbouring counties were occasionally summoned to attend at the curia regis, in order to take the oath of fealty and allegiance [2].

Sometimes the people so assembled, including those who were summoned for the purpose, were admitted to the body of the church, or other place where the assembly was held. At other times, and this was the general practice with the Anglo-Normans, the petitioners and spectators, the *plebs*, *populus*, or *vulgus*, assembled in the body of the place, the king and the magnates being in an inner chamber. This appears from the following [3] amongst many other authorities: Eadmer, an eye-witness, in describing the proceedings of the parliament held for settling the dispute between William Rufus and Archbishop Anselm, says: "Anselmus autem episcopis, abbatibus, et principibus ad se a regio secreto vocatis, *eos* et *adsistentem*, monachorum, clericorum, et laicorum numerosam *multitudinem*, hac voce alloquitur: Omnes

[1] V. Cal. Rot. Pat. p. 2. 8. Johan. &c.

[2] Chron. Sax. ad A.D. 1086. Hoveden, 460, 35. Bromt. 1006, 1. In after times the oath was taken at the county court. V. Cal. Rot. Pat. p. 33, 34.

[3] Et v. Ingulph. ad A.D. 855. p. 863.

dico qui hic congregati estis in nomine Domini precor intendite," &c.[1] It is impossible to suppose that the monks had been *summoned* to attend as members of this council, which would necessarily follow from the interpretation which Lord Lyttleton seems inclined to give to this passage. Hoveden, in describing the proceedings of a parliament held temp. Hen. I. A. D. 1108, which he calls conventus *procerum*, uses these expressions: "Dehinc præsente Anselmo *astante multitudine* annuit rex et statuit," &c.[2] The following account of a great council, held in the reign of Stephen, is given by a cotemporary author: "Omnibus igitur summatibus regni fide et jurejurando cum rege constrictis, edicto per Angliam promulgato summos ecclesiarum cum *primis populi* ad concilium Londonis conscivit. *Illis* quoque quasi in unum sentinam illuc confluentibus, ecclesiarumque columnis sedendi ordine depositis, *vulgo etiam* confuse et permixtim, *ut solet*, ubique se ingerente, plura regno et ecclesiæ profutura fuerunt et utiliter ostensa et salubriter *per*tractata[3]." Lord Lyttleton desires to change *illis* into aliis, but without referring to any manu-

[1] Eadm. Hist. Nov. 26. et v. ibid. p. 27.

[2] Hoveden, p. 471, 18—25.

[3] Gesta Reg. Steph. apud Duchesne, p. 932. 933. I have particularly noticed the use of the verb *per*tractare in this and other passages, in reference to what is said *ante*, p. 221.

script which would warrant such an alteration. The *multitudo* and *vulgus* mentioned in these passages cannot but refer to persons who attended as spectators and petitioners, amongst whom possibly may have been representatives from the boroughs which claimed a right not to be taxed at pleasure [1]. It is to this conflux of spectators and petitioners, also, that the terms "innumera turba regni," ad A. D. 1162, in Matthew Paris, as it appears to me, are to be referred [2]. The accounts given by Gervas, and by Hoveden, of the councils or curiæ held at Northampton by Henry II. A.D. 1164 and 1165, on the dispute with Becket, also favour the above supposition [3]. Fitz-Stephen, indeed, states that all who held in capite of the king were *summoned* to these assemblies; and it has been supposed, that it was the milites so summoned who sat in the outer chamber: but, according to Gervas and Hoveden, the comites and barones, or *proceres* alone were summoned. However, whether the milites were summoned or not, it is pretty evident from the above cited

[1] V. *ante*, p. 509.

[2] M. Paris, p. 83—85.

[3] "Intraturus (Becket) autem cameram qua rex et *aulici* ipsius præstolabantur adventum—Rex autem interius cum principibus sedens *pro tribunali*," &c. Gervas, p. 1392, 2. 60. &c. "Deinde intravit exteriorem cameram (Becket), et cum intrasset invenit *plebem multam* in ea, seditque inter eos; rex autem erat in secretiori thalamo cum familiaribus suis." Hov. p. 494.

passages, that they did not form part of the tribunal, or join in the deliberations. The assemblies of petitioners and spectators may also be recognised in the following passage from Matthew Paris, ad A. D. 1257: "In parliamento autem supradicto nondum finito rex (Hen. III.) in *audientia totius populi*, adducto monstratoque omnibus Edmundo—ait, Videte fideles mei," &c. In a preceding passage of the same author, *the parliament* is described to have been composed of "tota fere Angliæ *nobilitas*[1]."— When the plaudits of the auditors, whether summoned for the purpose or not, evinced their satisfaction with the result of the deliberations, such an additional sanction would naturally be noticed in the record which was drawn up of the proceedings of the council[2]; but, unless I have mistaken the documents I have referred to, the king and proceres alone decided upon all the measures discussed at the councils, both during the time of the Anglo-Saxon and the early Anglo-Norman sovereigns; and there is, as I read it, the testimony of the Saxon Chronicle, that the measures considered by the proceres or witan to be for the public good, were sometimes passed into a law, and inforced by the king, even though con-

[1] M. Paris, p. 813.; et v. ib. p. 812. See also Bromt. p. 1226. temp. Rich. I.

[2] Ingulph. p. 863. Et v. Rym. Fœd. to. 1. p. 16. temp. Steph. et ibid. p. 145.

trary to the known wishes of the people at large [1].

The business of the great council, as before observed, was generally to advise and determine upon all measures which concerned the common weal of the nation. In early times, the sovereign was frequently elected by the nation, collected in general assembly [2]. The dignified ecclesiastics

Business of the witenagemot or parliament.

Election of the sovereign.

[1] "Cœpit deinde rex frequenter quærere ex suis optimatibus (his witan) quid eorum singulis factu optimum esset visum quo huic terræ prospiceretur priusquam penitus devasteretur. Decretum est igitur a rege ejusque optimatibus *in universæ gentis utilitatem*, quanquam *omnes id inviti facerent* necessarium esse ut iis (Danicis, scil.) tributa persolvantur. Tum mittebat rex ad exercitum, iisque narrari jussit, cupere se ut fœdus inter eos sit percussum, ea conditione, ut tributa et victus iis subministrarentur: cui quidem omnes consenserunt; eosque aluit tota *Anglica natio*." Chron. Sax. ad ann. 1006. p. 136. 13. This is one of the instances where it is probable that the council was held in the presence of the whole body of the people, assembled *as an army*. V. *ante*, p. 495.

[2] Thus the Saxon Chronicle mentions that Edmund was elected by the proceres and citizens of London (a great part of England being overrun by the Danes), p. 148.; that Edward the Confessor was elected king by *all the people*, ib. p. 156. et v. int. alia Hoveden, p. 438. p. 46. temp. Hardicanute, p. 447. temp. Harold. Harold, who was himself elected king (see Hov. ubi sup. Simeon of Durham, 193.), declared, in answer to the demands of Will. I. that he could not deprive himself of his right to the crown: "Absque generali senatus *et populi* conventu et edicto." Malmsbury, p. 99, 43.

claimed to take the leading part on these occasions [1]. Though we are not to assume that all the kings who mention that they were elected, actually owed their crown to the suffrages of the nation, yet the constant habit of the Anglo-Saxon, Anglo-Danish, and early Norman kings, of claiming their crown as from the election of the people, shows that this was considered to be the surest and most legitimate title [2]. It was always considered necessary that the candidate should be of the family of the deceased sovereign, or have been appointed by his will [3].

Framing of laws.

The general laws of the land were universally made and altered at these assemblies [4].

[1] Henry, bishop of Winchester, in addressing the council he summoned on Stephen's capture, uses these expressions: "Cleri Angliæ ad cujus jus *potissimum* spectat principem *eligere* simulque ordinare." Malmsbury, 188. Malmsbury was present at this council. Becket, too, asserted, "regem potestatem suam ab ecclesia accipere." Hoveden, p. 497. Alfred's will gives some colour to the claim. V. Asser. Vit. Alf. p. 73.

[2] Thus Canute, who certainly gained the crown by conquest, claimed to hold it by the election of the people. Gale, p. 502. Hist. Eli. Five of seven kings that followed William the Conqueror had to rest their title on the same foundation.

[3] William Rufus, to support his own title, as son of William the Conqueror, styles himself son of William, "qui regi Edwardo hereditario jure successit." Carta Ann. 13. Will. II. Rymer's Fœdera, to. i. p. 5.

[4] See the prefaces to the Anglo-Saxon Laws in Bromton, and Wilkins, particularly

Granting of taxes.

In early times, the revenues derived from the royal domains, including the tallages collected from the royal boroughs, were amply sufficient for upholding the royal state[1]: and no general tax or subsidy was, or perhaps could have been raised from the proprietors of land without the consent of the nation. Hence, when a naval armament[2] was to be raised, or any other measure was to be adopted which required extraordinary expense and exertions, the king had recourse to the advice and assistance of the wittenagemot[3]. Danegelt, which, under the latter Anglo-Saxon sovereigns, was levied throughout the kingdom as a matter of right, was originally granted by the wittenagemot, to enable Hardicanute to keep up a sufficient armament to protect the nation from the attacks of the Danes. The succeeding kings, under the pretext that this tax was payable so long as the Danes were kept away, continued in the enjoyment of it for so long a period, that at length it

Bromt. p. 908. 37. In the Chronicles of Hagulstad, p. 311. 63. and Bromton, p. 1022. it is expressly mentioned, and this is confirmed by other documents, v. Knyghton, 2357, &c. that the alterations introduced by William the Conqueror were all made *consilio baronum suorum.*

[1] This was the case under the early Anglo-Norman sovereigns, as we learn from Mat. Paris, p. 316.

[2] Chron. Sax. 126. 130. 165.

[3] V. int. alia Chron. Sax. p. 126. 130. 132. 156. 161. 165.

was considered as due by custom [1]. In the laws of Canute [2], who caused many unheard-of tributes to be paid [3], the right of the king to raise *Ship-money* appears to be recognized; but, as before-mentioned, when Hardicanute attempted to levy this tax without the authority of the wittena-gemot, it excited considerable tumult [4]. Under the Norman, and probably under the Anglo-Saxon sovereigns, the amount of the ordinary *aids* to be paid by the tenants in capite, namely, on the king's son being made a knight, or his daughter being married, or for redeeming his person [5], and of the *scutages*, or compensations for the military service to be paid by those who did not send the requisite number of soldiers, according to their tenure, were assessed by the magnates assembled in parliament or at the curia regis [6]. It is possible, and indeed probable, as is before observed, that the general body of the thanes or milites, and certain of the citizens and burgesses of those

Aids.

Scutages.

Extraordinary aids or subsidies.

[1] The commissioners summoned by William, in the 4th year of his reign (Hoveden, p. 601, &c.) as well as those on whose report Domesday was compiled, appear to have treated the payment of danegelt as due to the king from the owners of land, by settled custom. Et v. Hoveden, 482, 9. temp. Steph. reg.

[2] § 31. Bromt. 923.

[3] Bromt. p. 907.

[4] Ibid. 932.

[5] V. Hoved. p. 725, 50.

[6] V. int. alia, Knyghton, 2357. temp. Will. II. Matt. Paris, A. D. 1109. temp. Hen. I. p. 53, 45.; et v. Hov. p. 736. temp. Rich. I. Mag. Cart. Johan. M. Par. 216; et *post.* p. 523. not. 3.

towns which, by grant or by custom, claimed a right of not being taxed at the pleasure of the king, may have been summoned, or permitted to appear on the occasions when subsidies were granted, in order that they might agree upon the offering to be made on the occasion by their respective towns[1], or be heard by petition as to the amount to be imposed upon them[2]: however, it appears from the general testimony of the Norman historians, down to nearly the end of the reign of Henry III., that the magnates alone exercised the right of granting subsidies in the name of the country at large[3].

[1] Deputies from boroughs appear to have attended the parliaments of Scotland for the like purpose, from an early period. See Hallam's Middle Ages, vol. iii. p. 49. in not. citing Fordun, vol. i. p. 193.

[2] The Decreet of Clothair, § 8. seems to refer to a similar practice amongst the Francs.

[3] The following authorities, in addition to those before cited, appear to me to establish the proposition stated in the text: "Anno gratiæ 1204, rex Johannes natale Domini celebravit apud Cantuariam—Deinde in crastino circumcisionis convenerunt ad colloquium apud Oxon. rex et *magnates* Angliæ, ubi concessa sunt regi *auxilia militaria*, de quolibet scuto, scil. duæ marcæ et dimid." Matt. Par. 176, 30. Henry III. A. D. 1225, held his curia "*presentibus clero et populo* cum magnatibus regionis." The king stated to the persons so assembled the wrongs he and his subjects had sustained in his transmarine dominions, and added, "Et cum multi sint *in causa*, multorum *subventio* erit necessaria. Petiit ergo ab omnibus consilium simul et *auxilium*," and proposed that a fifteenth of moveables throughout the

Appointment of bishops, &c.

The witan frequently claimed and exercised the right of electing the archbishops, and even the

kingdom should be granted to him: "His in hunc modum prosecutis archiepiscopus et concio tota *episcoporum, comitum, baronum, abbatum,* et *priorum,* habita deliberatione, regi *dedere* responsum quod regis petitionibus gratanter adquiescerent si illis diu petitas libertates concedere voluisset: annuit itaque rex cupiditate ductus quod petebant *magnates.*" M. Paris, p. 272. A. D. 1232, 16 Hen. III. "Convenerant ad colloquium apud Westmonasterium, ad vocationem regis, *magnates* Angliæ tam *laici* quam *prælati.* Quibus rex præposuit quod magnis esset debitis implicatus—unde necessitate compulsus *ab omnibus generaliter* auxilium postulavit. Quo audito, comes Cestriæ Ranulphus *pro magnatibus regni* loquens respondit, quod comites, barones, et milites, qui de eo tenebant in capite, cum ipso, erant corporaliter præsentes: et pecuniam suam ita inaniter effuderunt quod inde pauperes omnes recesserunt, unde regi de jure auxilium non debebant," &c. Matt. Par. p. 314. In the same year, a writ was addressed by the king to the collectors in the following form: "Henricus Dei gratia, &c. Petro de Thaneo, &c. salut. Sciatis quod, archiepiscopi, episcopi, abbates, priores, et clerici terras habentes quæ ad ecclesias suas non pertinent, comites, barones, milites, liberi homines, et *villani* de regno nostro *concesserunt* nobis in auxilium xl. partem omnium mobilium suorum apparentium." Matt. Paris, p. 320, 61. Brady, Appendix to vol. i. of Hist. of England, p. 182, sets out the writ in rather different terms. But, notwithstanding the terms of this writ, it was the *proceres* or *magnates* who made this grant in the name of themselves and the clergy and people in general, as we learn from p. 320, 61. which may serve to explain the concluding passage of the charter of the first year of Henry III. Other instances in this reign of convoking the *magnates* for the purpose of obtaining aids

bishops, at the general assemblies[1]. The parliament, in the reign of Henry III., insisted that the justiciary, chancellor, and treasurer ought to be appointed with their consent, according *to ancient custom*[2]. The nation at large were most materially interested in preventing the royal domains being diminished by improvident grants. No alienation, therefore, was considered as effectual unless it had the sanction of the wittenagemot[3].

Alienation of the royal domains.

The wittenagemot, equally with the curia regis, as before observed, was the supreme court of justice for hearing complaints against the proceedings of the inferior tribunals, and determining, in the first instance, lawsuits arising amongst the king's thanes.

Supreme tribunal for the administration of justice.

In the records which have been handed down to us, the laws and statutes which were made at the wittenagemot, in like manner as in the

Style of the enactments.

are mentioned p. 563 and 566. temp. Hen. III. The assessment upon the different classes of persons was made by commissioners appointed by the king. Hoveden, p. 778-9.

[1] V. int. alia, Chron. Sax. 121. 128.

[2] M. Paris, p. 778, 5.

[3] V. int. alia, Ingulphus, 876; 90. 882, 2. Thorn, p. 1762. Sometimes these grants are mentioned to be made licentia, or devota confirmatione of the optimates. Thorn, 2126. 2207, 65. Some were confirmed at a subsequent wittenagemot. Bromton, p. 913, 62. temp. Canut.

Francic records, are sometimes expressed to be made *by the king* alone[1], sometimes by the *king and his witan*[2], sometimes by *the witan* alone; but the general, and which ultimately became the universal form was, *by the king, by the advice of his witan*[3]. But, in whatever form the law itself was enacted, it was left to the king to publish it throughout the kingdom, and to put it in force; and for this purpose he issued, in his own name, his writs to the gerefas, and other persons in authority throughout the kingdom, embodying the statute in the form of an ordinance[4].

[1] Under the Normans, the same form was sometimes observed. "Postmodum, iii. kal. Augusti, clero et populo ad concilium Londoniæ congregato, astantibus archiepisc. et episc. cæteraque multitudine maxima procerum et magnatum, *statuit rex et concessit*," &c. Bromt. p. 1000. ad A. D. 1103. See also Stat. of the Realm, vol. i. p. 107.; ibid. p. 215. temp. Edw. I.

[2] So, under the Normans, some statutes are expressed to be made *by* the king and *the grauntz*; others at the instance of *the grauntz* alone. 33 Edw. I. ib. p. 144. 37 Edw. III. stat. 2. Some of the statutes in the reigns of Edw. II. and Edw. III. are stated to have been made *by* the *king and the nobles and commonalty*, see stat. 7. Edw. II. 10 Edw. III. stat. 2., stat. of the R. vol. i. p. 276., 34 Edw. III. ib. p. 364.

[3] Corresponding with, "by the *advice* of the Lords and Commons in parliament assembled." Stat. of the Realm, vol. i. p. 175. 180. ib. p. 189., 15 Edw. II., which is there stated to be the form *theretofore accustomed*.

[4] The Anglo-Norman practice as to the making and publishing acts of parliament, which probably was a con-

Many of the laws which were made relative to the matters above alluded to were only known to the compilers of the Anglo-Saxon as well as the Norman annals, from the ordinance or writ which was thus issued in the name, under the great seal, and nominally under the authority of the king; and therefore have been recorded by them as if emanating from *the royal prerogative*. Indeed, after the general diffusion throughout Europe of the study of the Pandects, the lawyers and clergy in general seem to have entertained an idea that temporal laws could have no other legitimate source [1].

tinuation of the Anglo-Saxon practice, is detailed in the Introduct. to the late folio edition of the Statutes of the Realm, p. xxxv. et seq.

[1] Unless the preamble of the stat. of Westminster the first had been preserved, it would have appeared that those statutes had emanated entirely from the royal authority, for the enacting part is in these words: "First, the king willeth and commandeth." The statutes of Gloucester, 6 Edw. I. are in this form: "The king *himself*, providing for the amendment of his realm, &c. as the good of the kingly office requireth." The *form* in which enactments were made was consistent with this language. The Lords and Commons, and clergy, in most cases separately (see the form in the Rot. Parliament. to. ii. p. 127—9. temp. Edw. III. Cott. abr. p. 33.), sometimes jointly petitioned the king that *he* would *enact*, and the king accordingly enacted, Rot. Parl. vol. i. p. 130-1, No. 42. The language of the Mandatum de Judiciis Episcopalibus a Secularibus secernendis, temp. Will. I. Rymer, to. i. p. 3. tends to shew that the same form of making laws prevailed at that time. The stat. 34 Edw. I. as *recorded*, is in the *form* of *letters patent*; and even the pre-

Time of holding the parliament.

The time of assembling the parliament appears to have been discretionary in the king, though by one of the ordinances which were imposed upon Henry III. at Oxford, A. D. 1258, he was bound, in analogy no doubt to the ancient custom in regard to holding of the curia regis, to summon a parliament thrice every year, namely, in February, June, and October.

Influence of the sovereign over the deliberations.

The influence of the kings over the deliberations of these assemblies, in early times, must have been very considerable. The prelates and abbots[1], who composed more than the majority, almost universally owed their advancement to the king. During the whole time of the Anglo-Saxon and Danish dynasties, the dignity of count or eorl was purely official, and the appointment was in the gift of the king[2], who, if we may judge from the early Norman practice, himself performed the ceremony of investiture, by girding the count with his sword of office[3]. The son was frequently appointed to succeed his father[4]; there are instances, too, of the brother, in default of sons, being ap-

amble of this statute would lead to the supposition that it had emanated solely from the royal authority. Stat. of the Realm, vol. i. p. 144—7.

[1] Chron. Sax. p. 161.

[2] V. int. alia Knyghton, 2333, 30. 2334, 63. Bromt. 948, 45. 974.

[3] V. Cart. antiq. temp. Johan. reg. cited 3d Lord's Report, p. 159.

[4] Sicque concessit rex (Edwardus) Siwardo Westmorl. Cumberl. et Northumb. quas quidem terras potenter pacificavit—et *quia* Waltef. *filius suus* adhuc *parvulus* erat

pointed to the vacant dignity[1]: but this appears to have been entirely in the discretion of the king. It seems, however, that no eorl or count could be *degraded* from his rank[2], though he might be driven to *resign* his dignity: in which case he descended to his former station[3].

The greater barons, under the early Norman sovereigns, like the king's thanes of the Anglo-Saxons, appear to have enjoyed their dignities solely in virtue of the tenure of a royal honour or barony immediately from the king[4], to which

datus est comitatus ejus Tosti filio Godwini consulis." Bromt. p. 946. This Tostig is afterwards called "Tostius comes." Ibid: 952. 18. "Deditque rex quidam Odoni, Somersetiæ, Dorsetiæ, et Devoniæ. consulatum, Algaro vero filio Leofrici consulis Haraldi tradidit consulatum." Bromt. 943, 30. This same Algar was appointed Earl of Chester on the death of Leofric his father, the late earl. Bromt. 952, 2. Knyghton, 2334.

[1] V. int. alia, Bromt. p. 79.

[2] This I assume from the following passage in the Saxon Chronicle relating to William I.—"Tradidit comites vinculis—Episcopis eripuit suos episcopatus et abbatibus suas abbatias comitesque in carcerem conjecit." Chron. Sax. 190. If William could have degraded the counts from their dignities, he would scarcely have stopped short when he did the above acts of violence to the bishops and abbots.

[3] "Dunelmensis etiam episcopus qui comitatum Northumbriæ gravi summa *comparatum* per aliquot annos possiderat resignando, desinens esse comes in simplicem episcopum rediit ut prius." Bromt. 1259. 25. Et v. ib. 1261.

[4] V. Dialog. de Scacc. lib. ii. c. 19.

the duty of attending parliament was annexed; nor does it appear that the later Anglo-Saxon or early Norman sovereigns had the power of depriving such a person of his rank, or preventing his attendance in parliament. Over this class of the proceres, therefore, the sovereign could not have had much influence: and the haughty, and at times even insolent conduct of the baronage towards Henry III., as recorded by Matthew Paris, indicates that they were fully sensible of their state of independence.

From the reign of Stephen [1], the crown lost much of its influence over the eorls or counts, by the general introduction of the practice of conferring earldoms by hereditary grants [2]. Soon after this period, however, the crown obtained a considerable accession of influence by the right which it assumed of creating earls of particular districts, castles, or chief towns, which for this purpose were erected into counties.

[1] At this time, such was the general spirit for hereditary succession, that ecclesiastical benefices were commonly conferred, as it would appear almost as of course, on the son of the last incumbent. V. Litt. Lucii II. Papæ, temp. 9. Steph. Reg. Rymer. Fœdera, tom. i. p. 14.

[2] Many records of such grants, from the reign of Stephen, may be seen in Rymer's Fœdera, to. i. p. 13. 16. 18. 41. &c. new ed. Et v. Bromt. 1043. &c. Knyghton, 2347, 8. &c.

Some persons too were gratified with the grant of the title of earl, to which, ostensibly at least, no territorial possession or other benefit was annexed, than the third penny of all royal fines and dues on judicial proceedings in the county, there being at the same time an earl of the county from which such third penny was payable[1]. The influence of the crown also was materially augmented after the lesser tenants in capite ceased to attend the parliament, by the assumption of the prerogative of summoning to the parliament by special writ, as one of the magnates, any of this class of tenants in capite, whom the king chose to select. With such means of influence over the great council of the nation, coupled with the power which the kings exercised of appointing and removing at pleasure[2] the sheriffs of the counties, whose influence in the country was very considerable, it is pretty evident, that had not the freeholders and burgesses established the right of sending members to parliament, to give their assent as to matters of taxation, upon which the

[1] V. Rymer. Fœdera, to. i. p. 18. ad A. D. 1153. Third Report of the Committee of the Lords, p. 230, &c. Lord Kaims's Essays, No. III. According to the dialogue concerning the exchequer, at the end of Madox's History, p. 399, the earl originally always had the third penny arising from all pleas held in his county.

[2] Diceto, p. 605, 30. Bromt. p. 989, 24.

right to interfere in matters of general legislation naturally became ingrafted, it would scarcely have been possible to have restrained the British sovereigns from so far enlarging their prerogatives as to have gained sooner or later an authority equally arbitrary as that which was assumed, and has been to a great degree retained, by the sovereigns of continental Europe.

CHAPTER XXV.

GENERAL SUMMARY AND CONCLUSION.

Review of the Barbarian institutions, and comparison with those of the Romans.

IN taking a retrospective glance at the laws and institutions which have been the subject of the preceding chapters of this book, it is impossible not to observe the marked similarity which existed between those of each of the states of Europe. Knowing as we do that the institutions which prevailed amongst the Barbarians in their native countries, were ill calculated for the artificial relations which are introduced into society, even in the first stages of civilization, and that there existed in the countries in which the Barbarians finally settled, institutions and laws well calculated for a state of society advancing in civilization, as were the Barbarians when their codes were compiled, we are naturally led to suppose that the Barbarians would be induced to adopt, in a great degree, the laws and institutions of the conquered countries.

A comparison of the laws and institutions of the Barbarians with those which had prevailed before the conquest, confirms this supposition.

Prerogatives of the Barbarian sovereigns.

The kings and leaders, though at first perhaps some of them in order to reconcile the provincials to their authority may have claimed the insignia and authority of proconsuls rather than of kings, soon arrogated to themselves, even as against their Barbarian subjects, and to a great extent were allowed to assume, a large proportion of the imperial prerogatives.

The Barbarian kings appointed to all offices of dignity and honour, both civil and military; and, under the shadow of an election, they nominated to the chief dignities of the church. The kings were also the fountains of justice; and even the laws which were effacted at the national councils were promulgated in the name of the king[1]. In England, the sanction of the king to all public acts of legislation expressed down to this day in the words *le Roi le veut*[2], has handed down the pretension set up by the Norman, as well as the Anglo-Saxon sovereigns, that *quod principi placuit legis haberet vigorem.*

The Barbarian kings also had ample domains[3] allotted to them, which were continually increased by the imperial prerogative of confiscation; and they exercised, by their ministers, the same territorial jurisdiction as was claimed by the Roman

[1] Vide *ante*, p. 263.; and in regard to England, see also 4 Instit. p. 26.

[2] See Appendix, No. I.

[3] *Ante*, p. 36. and 266.

emperors[1]. The kings, however, were generally unsuccessful in their attempts to establish a right to taxation, at least over their Barbarian subjects[2]. The tax of Danegelt can scarcely be said to have been an exception[3]. Clovis could violently put to death a warrior, in the face of the army, without exciting a murmur, but would have lost his crown had he persisted in taking more than his share of the spoil[4].

The Barbarian sovereigns also endeavoured to imitate the emperors in the splendour of their court. Officers of the palace were appointed, with functions very similar to the ministers of the imperial household; and no one could claim to be a member of the king's court, which conferred the highest dignity that a subject could enjoy, unless he or one of his ancestors had been advanced to that honour by the favour of the sovereign.

Provincial government.

The imperial system of provincial government was, to a great extent, continued; the distinction, however, between the civil and military government of the provinces, or counties, was not kept up, there being no class of persons competent to the former, who were not equally well qualified for the latter;

[1] *Ante*, p. 41. and p. 267. The proceeding by *inquisitio post mortem* may also be traced to the Romans, v. *ante*, p. 37. and Blackst. Comm. vol. iii. p. 258.

[2] *Ante*, p. 269.

[3] *Ante*, p. 521.

[4] See the story of the vase of Soissons, in Gregory of Tours, and Aimoin.

however the bishop of the province was associated with the count in the exercise of his civil functions.

Office and duties of the count or eorl.

The office of the Barbarian count, or eorl, differed in few respects from that of the ancient Roman proconsul or præses. He had supreme civil and military command in his district. The army that he commanded, which consisted of every freeman in his county, was, during the early period of the Barbarian history, almost as completely under his command as were the palatine and provincial troops of the Roman empire. The Barbarian army, however, was settled in permanent habitations, the Roman legionaries were stationed in temporary quarters. Of this the early history of the Goths affords a striking illustration [1].

County court.

The *mallus*, or county court, which was held by the count or eorl, was very similar to, and, I cannot doubt, was formed on the model of, the *conventus* of the Roman proconsuls [2]. Every freeman, whose landed property was sufficient to give him consequence, was liable to appear there at the summons of the count or eorl. This court, like the *conventus* of the Roman proconsul, was the grand tribunal for the decision of all judicial controversies, both civil and criminal. In civil trials, the count or eorl assisted by the bishop, like the Roman proconsul, acted merely as president to expound the law: the questions of fact were de-

[1] *Ante*, p. 243.

[2] *Ante*, p. 70. 439. et seq.

cided upon, and the judgment pronounced, particularly amongst the Anglo-Saxons, by the freeholders alone[1]. In some nations this function was performed by a certain few: as in the latter days of the Francic empire, by the *Rachimburgii*, *Scabini*, or *Sagibarones*, who were probably selected, like the Roman *judices*, from the most wealthy possessors[2]; in others, the whole body of the freeholders assembled at the court acted as judges[3].

Method of trial.

The favourite mode of trial also, namely, by compurgation, was, as it appears to me, evidently derived from the mode of decision by putting the decisory oath, which was in use amongst the Romans[4].

Cultivators of the soil.

As there were similar ranks and distinctions in the higher orders of society amongst the Barbarians; there were classes of persons in the lower ranks similar to those which had existed in the Roman provinces. The important class of culti-

[1] *Ante*, p. 173. and 440-7. I must, however, apprize the reader that the text is at variance with the theory of M. Meyer, Introduction, p. xxxiii. lxviii. &c. to. i. p. 35, &c., though this ingenious and very learned author admits that a considerable analogy existed between some of the institutions of the Barbarians and those of the Romans, to. i. p. 129.

[2] V. *ante*, p. 440-6. and p. 172. and 200. If, as M. Meyer supposes, the *Rachimburgii* were a class of persons similar to the *Ricos hombres* of the Spaniards, to. i. p. 112, this, as it appears to me, strongly supports the analogy.

[3] *Ante*, p. 450. Meyer, to. i. p. 373.

[4] *Ante*, p. 468.

vators, amongst the Anglo-Saxons called *ceorls*, and amongst the continental nations *liti aldii* and *tributarii*, were so similarly circumstanced to those of the Roman cultivators, that it is highly probable that they were a race whose stock is to be traced to the ancient *coloni* of the provinces. Tenure in villenage, from whence copyhold tenure arose, may also be traced to a similar source [1].

Relation of patron and freedman, and patron and client.

The widely extended relation of patron and freeman was universally adopted by all the Barbarian nations. The relation of patron and client, or, as it was afterwards denominated, of lord and vassal, which had been established amongst the Romans for the protection of the weak against the strong, was so perfectly adapted to the manners and state of society in which the Barbarians found themselves after their settlement, that they adopted and cherished it as their own. In the 9th century there was scarcely a freeman in Europe who did not stand in the relation of vassal or of patron: many persons sustained the double character of patron and of vassal.

Different kinds of property.

The distinction of property into moveables and immoveables, or, to use our legal expression, into real and personal, was almost universally introduced into the Barbarian codes.

The advantages which attended the ownership of land, beyond that of any other property, in the

[1] V. *ante*, p. 33-4. Bracton, fo. 26. Reeves, iii. 158.

Roman provinces, were, as we have seen, very considerable [1]; yet the very marked and peculiar advantages which, according to the laws of the Barbarians, were universally given to the proprietors of land, which naturally resulted from their indisposition to engage in commercial pursuits, must be considered as one of the leading and characteristic features of the Barbarian institutions. Tenure of land by the client of his patron can scarcely be said to have existed as a *system* amongst the Romans, but the whole of the services and burthens of the feudal tenant appear to me naturally to have resulted from the adoption of the relation of patron and freedman, and patron and vassal of the Romans [2].

Forms of alienation.

The forms of alienation and disposal of property, particularly by will, were almost universally adopted by the Barbarians from the Romans. In regard to commercial transactions in general, there is every probability that the ancient Roman laws were not disturbed by the continental Barbarians: indeed, the laws in regard to contracts, which are to be found in their codes and collections of capitularies, are almost entirely Roman. The predatory habits of the Anglo-Saxons, for years after their settlement in Britain, rendered it necessary that particular laws should be enacted in regard to the sale of cattle and other moveable property [3]. Little be-

[1] V. *ante*, p. 9. 167. &c.
[2] *Ante*, p. 58-60.
[3] *Ante*, p. 475-6.

yond this is to be found in their codes on any subject connected with mere civil legislation. What laws in regard to contracts in general existed amongst them (and some there must have been, as commerce was carried on in many towns to a considerable extent), were preserved by tradition in London, and the other trading towns throughout the kingdom. Bracton, in the reign of Henry III., took the pains to set down in writing these unwritten laws or customs; and so little had they departed from their Roman originals, even after a lapse of many centuries, that he found that they might, with trifling variation, be expressed in the very terms of the Institutes and the Digest of Justinian, which had then become an object of ardent study throughout Europe.

The criminal code of the Barbarians was founded on a basis peculiarly their own, namely, that of permitting the offender to pay, and compelling the offended person to receive, a settled price to allay the resentment occasioned by every act of violence without distinction. Of this branch of the Barbarian institutions there are few vestiges now remaining in any country in Europe.

Authority of the civil law re-established in continental Europe.

As the basis of all that was worthy of the name of legislation, which was found in the continental codes or in the capitularies of Charlemagne and his successors or which was preserved by tradition, was founded on or adopted from the Roman institutions, this afforded a great facility to the intro-

duction of the Roman laws throughout Europe, after the revival of the study of the Roman law, which was excited by the discovery of a complete copy of the Institutes and Pandects at Amalphi in the year 1135.

"Accordingly, in the southern parts of France, very soon after the above-mentioned period, the doctrines of the institutes, pandects, code, and novels, excepting so far as was incompatible with the feudal relations, were allowed the force of law. The inhabitants of the northern provinces of France, until the promulgation of the Code Napoleon, continued to live under distinct customary laws, in which many of the Barbarian usages were preserved. But the civilian who peruses the elegant code above adverted to, will find in it comparatively little but what has been the chief subject of his admiration in the confused and ponderous volumes of Justinian and his assistants.

The Roman law, as contained in the compilations of Justinian, did not find its way into Germany so early as in France. However, in the fourteenth century, universities for teaching the civil law, from its authentic records, were spread over Germany. From the universities it gradually was introduced into the tribunals[1]; and after having become the customary law throughout Germany, it was, in the year 1495, under the

[1] Introd. à l'Etude du Droit Romain, p. 175. § lxviii.

emperor Maximilian, who claimed to be the successor of Constantine and Justinian, virtually established in the supreme tribunals of the empire. Before the end of the succeeding century the civil law was almost universally established in all the tribunals of the several states of Germany. From the beginning of the sixteenth century downwards, the civil law has been studied and commented upon in the Low Countries with an ardour and success which has scarcely been rivalled by any other country of Europe. In Spain, the Roman law has obtained the same authority as in Germany [1].

In the year 1066, England was subjected to the horrors and confusion of a conquest: but the institutions of the conquerors varied little in principle, not very materially in their detail, from those of the Anglo-Saxons [2]. Oppressions and miseries of every kind were at first heaped upon the conquered people, especially after their unsuccessful attempts at revolt; heavy taxes also were imposed upon them by the king's mere sovereign will [3]. But the English were per-

[1] Hallam's Middle Ages, vol. iii, p. 516.

[2] Edward the Confessor was educated in Normandy, and introduced into England many alterations on the model of the Norman institutions.

[3] V. int. al. Knyghton, p. 2344. Will. II. continued to exact arbitrary taxes. Malmsbury, p. 124. Hoveden, p. 450, &c. though contrary to law, v. Leg. Will. I. c. 35.

mitted to retain their constitution and their laws, with such variations[1] as the Conqueror, with the advice of his barons[2], thought fit to introduce; and in the reign of his sons, the Normans were equally strenuous as were the English for the preservation of the ancient Saxon institutions.

The successors of William the Conqueror down to Henry III., were continually acting upon and endeavouring to introduce the laws which were prevalent in France and Normandy. All such attempts were uniformly met by petitions for a restoration of the laws of Edward the Confessor. Whenever it was requisite to conciliate the people, a solemn promise to restore or confirm, or a charter actually purporting to restore or confirm the laws of Edward the Confessor, was issued in the name of the king[3];

[1] William I. evidently intended to have effected a complete revolution in the government and laws, but was prevailed upon by the strong expressions of public opinion in favour of the ancient institutions, to permit the greatest part of them to be re-established or continued. Chron. Lichf. Wilkins, p. 216.; and see Hales's Hist. of the Common Law, chap. v. ad fin.

[2] Ante, p. 521. note.

[3] The promises of William Rufus imported a remission of the forest laws, and a general amelioration of the laws. Knyghton, p. 2359. Bromt. p. 984. Henry I. and his successors promised to restore, or actually restored, specifically the laws of Edward with the Conqueror's alterations. See the charters of Hen. I. and Stephen. Stat. of the Realm, p. 1. and 4. of the Charters. Hoveden, p. 468. and Bromt. p. 1022, &c.

and that such laws, though with considerable variations, were finally re-established in the kingdom, is evident from the treatise called the Laws of Henry I. Bromton, who lived in the reign of Edward III., states that the laws of Edward the Confessor were in great part followed even in his day[1]; but this can scarcely be reconciled with history, unless he refers only to the county courts.

Permanent alterations in the constitution and laws made at the conquest.

However, some very important alterations were made at the conquest, both in respect of the constitution and the laws, which were permanently established. The king, as was natural after a conquest, became more decidedly the sovereign chief of the state, and many of the prerogatives which under the Anglo-Saxons were considered doubtful, became confirmed in the person of the Conqueror. William also, having, it would seem, seized all the lands in the kingdom, divided them amongst his followers and supporters, on the condition of military service to *himself* as king[2]. The lands so granted were apportioned into knight's fees, so as to secure to the sovereign the service of a definite number of warriors (60,000), whom he should always have at command for defence of his dominions, or a competent sum in money[3], to be

[1] Bromton, 937, 19.

[2] Huntingdon, p. 309. et seq. Bromt. p. 933.; and see Bracton, as cited below.

[3] Ordericus Vitalis cited. Wilkins, p. 212. "Item dicitur (scutagium) regale servitium, quia specialiter pertinet

rendered by way of *firdwite* or fine by those who declined to attend in person. This fine or composition, from the reign of Henry I. obtained the name of *scutage* or *escuage* [1].

Services due from the vassal to the lord.

The services due from the vassal to his lord, which under the Anglo-Saxons were indefinite and variable, were rendered fixed and certain by William, according to the model, as it is supposed, of the Norman institutions. Some new burthens, too, such as that of wardship, and the right of disposing of the female vassal in marriage, which perhaps had before only existed by special custom, were made part of the general system.

Gradual formation of the present constitution of parliament.

The constitution of parliament under William I. and his immediate successors, has been considered at some length. There is reason to think that it was the intention of Edward the First or his advisers to have confined the office of the Commons to the presenting petitions, (a liberty which the Roman provincials, in theory at least, enjoyed to the fullest extent); and that of the Lords to offering their advice (the office which the Roman emperors assigned to the prætorian præfect and his companions [2]); and to have reserved to himself the sole power of *making* the laws. The statutes of Gloucester, 6 Edw. I. are prefaced

ad Dominum Regem, et *non ad alium*, secundum quod in conquestu fuit adinventum." Bracton, lib. ii. c. 16.

[1] Mad. Hist. Exch. i. p. 625.

[2] *Ante*, p. 62-4.

with these words: "The king *himself* providing for the amendment of his realm, and for the fuller administration of justice, as the good of the *kingly* office requireth." The statute of quo warranto[1] is expressed to be made "*by* the king of *his especial grace*, and for the affection he beareth unto his prelates, earls, and barons, and others of his realm." Most of the other acts of this reign are drawn up as *concessions* from the king to the people, and in language which might well have been used in an imperial constitution.[2] However, in the succeeding reign, the Commons asserted their right to be put upon an equal footing with the Lords; and by a statute of the 15 Edw. II. it was declared that matters established for the state of the king and of the realm and of the people, should be done in parliament *by* the king, and *by the assent of* the prelates, earls,

[1] 18 Edw. I. Stat. of the R. vol. i. p. 107.; et v. ante, p. 527.

[2] The statute of Wynton, 13 Edw. I., of persons to be put on assizes, 21 Edw. I., the articuli super Cartas 28 Edw. I., ordinat. Forestæ, 33 Edw. I., and many others, (see particularly Stat. of the Realm, vol. i. p. 144-7) are drawn up as *concessions* from the king. This form had been used also in the reign of Hen. III.; ibid. p. 19. Some, as *de falsa moneta*, 27 Edw. I., are stated to be made by the king *and his council*. Stat. of the R. vol. i. p. 133. The Stat. of Carlisle, 35 Edw. I. notices the *advice* of the great men and nobles. Ibid. p. 152. But when the commonalty are mentioned, it is as having laid *complaints* before the king. Ibid. p. 113, 153, &c.

barons, and commonalty, according as it had been *theretofore accustomed*[1]. In this reign, too, it was ordained that parliaments should be held annually[2]. In the reign of Edward III. the Commons advanced in their pretensions, and claimed to join in *enacting* the laws[3]. But though this claim was not established, or indeed at that time persevered in, their right to *interfere* in matters of legislation appears to have been established in the reign of Edward III. The right of the Commons to originate money bills was finally settled in the reign of Henry IV.[4]. So long as the statutes were drawn by the clerks of the Chancery, and entered on the statute roll[5], from the petitions of the Commons either in writing or by the mouth of their speaker, and the answers of the king and

[1] Stat. of the R. vol. i. p. 189.

[2] 5 Edw. II. c. 29.; ibid. p. 165.

[3] Stat. 10 Edw. III. Stat. of the R. vol. i. p. 277. "These be the things which our Lord the King, the Prelates, Lords, and *the Commons* have *ordained* in this present parliament." 34 Edw. III. Stat. of the Realm, vol. i. p. 364. a very important statute relating to justices of the peace, and many other matters. The letters patent, 7 Edw. II. reciting the proceeding of the parliament held the 15th Oct. in that year, show that this was not quite a novel or unauthorized pretension of the Commons.

[4] Hallam, vol. iii. p. 153.

[5] It was from this time they became binding as acts of parliament. Cotton. Ab. p. 45.

the council [1], without the Commons having any controul over the terms on which they were framed, statutes very different from what they had petitioned for might be, and often actually were, enacted. To provide against this evil, in the second of Hen. V. it was granted by the king, at the instance of the Commons [2], that nothing should be enacted on the petition of the Commons that was contrary to their asking, whereby *they should be bound without their consent.* But the due enactment of the laws, as assented to by the Lords and Commons, was for the first time effectually secured by the practice which obtained in the reign of Edw. IV. of reducing all petitions into the form of acts, and presenting them in that state for the royal assent [3]. This practice also enabled the Commons to insure their being consulted in regard to the acts originating with the Lords.

Institution of justices of the king's superior courts.

The most important of the revolutions in the judicial polity of the kingdom that is to be traced to the conquest, is the establishment of the general jurisdiction of the king's justiciars, who are now represented by the judges of the courts of King's Bench, Common Pleas, and Exchequer.

[1] See the preamble to the Articuli Cleri, 9 Edw. II. stat. 1.

[2] Mr. Hallam, vol. iii. p. 135. has set out the petition and answers.

[3] Preface to Ruffhead's Stat. at large, p. xv. and the references.

It is clear that the curia or forum regis of the Anglo-Saxons, held cognizance of judicial controversies amongst the magnates or proceres; but no trace can be discovered that any particular members were intrusted with the decision of the questions which were brought before this court.

William the Conqueror appointed a certain number of the *magnates*[1], or members of the curia regis, to act as justices[2]. One of their number was denominated the high justiciar; he had rank and authority very similar to the Anglo-Saxon totius Angliæ Aldermannus, and acted as viceroy in the absence of the king[3].

The county courts, the hundred courts, and the halmote courts, were never courts of record[4]. They had no settled form for conducting their pleadings, and the mode of proceeding in them was very unsatisfactory[5]. From the time that regular justices

[1] Thorn. 1873, 53.

[2] Frequent mention of the justiciarii is to be found in the records of the early Norman times. Rymer's Fœd. to. i. p. 2, 12. Huntingdon, p. 370. temp. Will. I. Thorpe's Reg. Roffens., p. 37. temp. Hen. I. and Steph. Brompt. p. 1226. Temp. Rich. I. Gerv. p. 1793. Temp. Hen. II. See also Madox's Hist. of the Exch. vol. i. p. 31, &c.

[3] M. Par. 1014, 68, &c. Henry II. appointed three bishops chief justiciars. Diceto, p. 605.

[4] Glanville, lib. viii. c. 9. "Nulla curia recordum habet generaliter, præter curiam domini regis." And see 4th Inst. 266, 267.

[5] Stephen on Pleading, Append. p. xxi. xxiii. The constitution of the county court remains as it was

were appointed to determine causes in the *curia regis* or king's court, it became an object of importance with all classes of subjects to have their causes, more especially in regard to lands, there decided. From the time of Henry I. the privilege of suing and being sued in the *curia regis*, was granted by the king as a special favour[1]: and though Henry I. and Stephen directed that the county courts should be held as in the time of Edward the Confessor, yet the privileges of those who were entitled to resort to the curia regis were expressly reserved[2].

In the reign of Henry II., the curia regis held cognizance of all pleas of debt[3]; and so generally was this court resorted to, that it was considered necessary to appoint itinerant justices, or justices *in eyre*, distinct from the judges of the curia regis, to go *iters* or circuits through the realm, to determine pleas in the several counties. These justices, as we have seen, were also fiscal officers; their authority in civil and criminal matters was

amongst the Anglo-Saxons, the *suitors* being the judges, (4th Inst. 466.) as they are in the *courts baron* of manors, which are the remnants of the *halmote* courts. See Blackst. Comm. vol. iii. p. 34.

[1] Cart. Hen. I. Rymer's Fœd. to. i. p. 12. Mad. Hist. of the Exch. vol. i. p. 96-117.

[2] Stat. of the Realm, folio edit. p. 4. of the Charters. Hagulstad, p. 314, 315. Malmsb. 179. Brev. Hen. I. Rymer, to. i. p. 12.

[3] Glanv. lib. x. c. 1.

the same as that of the justices of the curia regis[1]. The practice of sending justices in eyre, which was continued by the succeeding sovereigns[2], by bringing home justice in its then most perfect form to each man's door, though sometimes made the instrument of extortion on the part of the kings[3], effected, about the reign of Edward I., that the county and hundred courts were seldom resorted to on questions of importance; but by the statute of Gloucester, 5 Edward I. c. 8., it was enacted that no action should be brought in the king's superior courts for any matter under the value of forty shillings[4].

Mode of proceeding in the *curia regis*.

The mode of proceeding in the curia regis was very different from that which had prevailed in the county and hundred courts, and courts of halmote and burgmote. In the former the proceedings were commenced by formulæ, or writs issuing out of the Chancery, analogous to the Roman *formulæ*, from which they were evidently borrowed[5]. In the county and other provincial

[1] Mad. Hist. of the Exch. vol. i. p. 122. Mirror, ii. § 3.

[2] "Justiciarii errantes per totum regnum." Rot. Pat. 3. Hen. III. m. b. a tergo, ib. 18. Hen. III. &c.

[3] Henry II. is complained of as "justitiæ venditor et delitator." Bromt. 1044.

[4] And see the Mirror, c. ii. § 3.

[5] Lord Coke (citing the Mirror of Justices, cap. 1. § 3.) seems to have thought that there was a Court of Chancery, out of which remedial writs issued in the time of Alfred. 4th Inst. p. 78.; but the Mirror cannot be of such antiquity as Lord C. and Plowden supposed.

courts, no formulæ or writs were used [1]. The distinctions of actions which existed amongst the Romans, into actions *stricti juris*, and equitable actions, was also adopted in the curia regis. Actions of debt and trespass were of the former description: actions on the case, which appear to have been in use for some time before the statute of Westm. 2. 13 Edward I. were of the latter description: no such distinctions could have existed in the provincial courts.

The strict rules of pleading which had been abolished in the latter years of the Roman empire, were revived in the curia regis: in the time of Edward I. they existed in all the rigour which had been denounced by Cicero [2]. The introduction of these technical rules of pleading, which, with some modification, continue to the present day [3], would have been most mischievous in the local courts, where the parties conducted their own pleadings, but it was not productive of

[1] Mirror, c. ii. § 3. In the county courts, actions are still commenced by plaint or memorial.

[2] See the Statut. Walliæ, § Declaration. "Not following that hard rule—he who fails in a syllable, fails in the whole cause." Stat. of the R. folio ed. vol. i. p. 64. Et v. *ante*, p. 171.

[3] Our ancestors, it may be observed, have also adopted and *improved* upon the Roman system of legal fictions (*ante*, p. 156, &c.), for with us, not only is the plaintiff in an action of ejectment *compelled to state*, but the defendant *to admit*, what is known to be perfectly untrue.

such evil consequences in the *curia regis*; for, in this court, even in the time of the Anglo-Saxons, the pleadings were conducted by professed advocates: in the time of the Normans, the parties themselves were totally precluded from conducting their own causes, as the great bulk of the people were unacquainted with the language in which the proceedings were carried on [1].

It is from the time of the establishment of the general jurisdiction of the king's justiciars that the greatest part of the doctrines of what is now called the common law of England must be dated. Almost the whole of the law as to land or real property, excepting what we find in the statutes in regard to entails and some other particular subjects, must have been fabricated, or at least modelled, in the curia regis. As to the law of descent, this is perfectly obvious; for, in the time of William I. [2] the children divided the inheritance of their ancestor in equal proportions; in the time of Henry I. the eldest son took the principal fief, but the rest of the inheritance was divided between the sons in equal proportions. In the reign of Edward I. the same law of descent prevailed as now obtains.

The whole system as to real actions, which has

[1] V. *ante*, p. 283. n. 3. and see Meyer, Institutions Judiciares, &c. to. i. p. 141. Stephen on Pleading, Append. p. xiv. &c.

[2] Wilkins, p. 225.

happily become obsolete, and which, it is to be hoped, is soon to be abolished, must have been introduced by the pleaders and judges of the curia regis: so there are few of the doctrines of the common law as to personal actions and pleadings in general but must have had their origin in the curia regis. That "money lent upon bond is recoverable *by action of debt*," which is instanced by Sir William Blackstone[1] as one of the doctrines of the common law, cannot possibly have existed before the conquest, unless, perhaps, in the curia regis.

Nearly the whole of the doctrines of the common law relating to crimes, and all the forms of criminal proceedings, of which much has been borrowed from the Roman law[2], must have been framed in that branch of the curia regis which obtained the name of the Court of King's Bench. For instance, the doctrine, "that breaking the public peace is an offence, and punishable by fine *and imprisonment*," which Sir William Blackstone[3] particularly instances as another of the doctrines of the common or unwritten law, cannot have had its origin as regards the punishment of imprisonment, until after the Anglo-Saxon laws were abrogated. Indeed, following each of the leading doctrines of

[1] Blackst. Comm. vol. i. p. 63.

[2] Compare Delolme on the English Constitution, book i. c. 13. with p. 198 to 202. of the first book of this work.

[3] Vol. i. p. 63.

the common law, there are but few that can be traced to a much earlier period than the reign of Edward I., and what can be so traced are chiefly found to be the remnants of the ancient Roman laws handed down by tradition[1]. In and before the reign of Edward I., although the doctrines of the civil law were not always adopted in their terms, it is evident, particularly from the works of Glanville[2], Bracton, and Fleta, that they were largely drawn upon by, and most materially influenced the decisions of, the justices of the two benches.

It naturally becomes the subject of inquiry, how the mere decisions of the curia regis, especially on such important matters as changing the course of

[1] *Ante*, p. 540. Nothing, as it appears to me, can have less of probability than the supposition so fondly cherished by Sir William Blackstone, vol. i. p. 64. that the rudiments of the present common law of England were contained in the supposititious Dombec, or Liber Judicialis of King Alfred. Why the Dombec referred to in the laws of Edward the Elder is to be supposed to be a compilation of which we have no certain account, at least that I can find, when there is extant a collection of laws, namely, the code of Alfred, to which it may be referred without the aid of suppositions, I am at a loss to discover. Surely had any such book existed so late as the reign of Edward IV., the historians who are so copious in the details of the Anglo-Saxon laws, and who give us a copy of the code of Alfred, would have referred to this Dombec; nor is it probable that Bracton and Fleta, and the other law writers of the time, would have passed it over without a single quotation.

[2] See particularly Book x., and Beames's notes.

descent, and altering the criminal law, acquired the force of laws, in a country where, in theory, the laws can only have their force from the consent of the King, Lords, and Commons, in parliament assembled. Some persons have supposed that these changes must have been effected by acts of parliament, the records of which are lost. But it is not by any means necessary to resort to this supposition. With the study of the Roman law, the Roman principles of legislation became familiar to the Norman and English lawyers. Consequently it became known, that a very great proportion of the law which was then the object of study throughout Europe was framed by the jurisconsults, without any other public sanction than that of tacit consent. It seems therefore very naturally to have been considered, that that could hardly be considered as an usurpation on the part of justices appointed by the sovereign who was the fountain of justice [1], which had been sanctioned on the part of unaccredited jurisconsults, in a republic so jealous of any stretch of arbitrary authority as was that of Rome. Accordingly, as it would appear, the justices of the two benches were permitted, by their solemn decisions, framed *pro re nata*, and recorded in their respective courts, not only to declare the law where doubtful, or where no rule before prevailed, but also to accommodate the law to the altered state of society, until, by a

[1] Britton, cap. 1.

succession of precedents, a system of law suited to the exigencies of society was completely established; and though the principle of *stare decisis*, which is generally acted upon, has long prevented the courts of law from attempting any fundamental alteration in the recorded law, the process of judicial legislation has not by any means ceased in any of the courts of Westminster Hall, as about 3818 pages of Reports of their Decisions annually testify.

Jurisdiction of the ecclesiastical courts.

Soon after the separation of the ecclesiastical courts from the civil tribunals, the former assumed exclusive jurisdiction, not only of all matters strictly ecclesiastical, but also of all questions relating to wills and marriages, which, notwithstanding what is said in Hensloe's case, reported by Lord Coke, must, as I conceive, have included the probate of wills. Their title to this jurisdiction was fully established in the reign of Henry III.[1]. The clergy, in early times, also claimed jurisdiction in matters of trust or conscience, and in all questions whatsoever where an oath had intervened[2]. In England these claims were never recognized. Before the establishment of the Court of Chancery, the king's council appears to have been the proper tribunal

[1] Bracton, ii. 26. § 2. p. 61 a.

[2] See Matthew Paris, ad A. D. 1190, p. 134. "fidei læsio et juramenti transgressio," was what they claimed jurisdiction of.

for obtaining relief in matters of conscience or trust requiring a remedy but which were irremediable in any of the king's ordinary courts: and, by the Constitutions of Clarendon, the ecclesiastical courts were prohibited from interfering in any question as to contracts, even though an oath had intervened, parties being left to their remedy in the king's ordinary courts[1].

It may be here remarked, that although the clergy, at least from the year 1255, were summoned to parliament, and proctors were elected and their names returned upon the writ of summons issued to the bishops down to the time of the Reformation, yet that they seldom interfered in matters of legislation, even when they attended in parliament; and that, from the beginning of the fifteenth century, they ceased altogether to attend, and gave their money only in convocation[2].

Of the Select Council from which the courts of Star Chamber and of Chancery arose.

A distinct council, called the Select Council, or sometimes simply the Council, was introduced by William the Conqueror, shortly after the conquest. There is a considerable degree of uncertainty in regard to the nature and powers of this council. It was clearly distinct from the parliament, though forming a constituent part of it when assembled. From Henry III. downwards, the members of this

[1] Reeves's Hist. of the English Law, vol. i. p. 77. M. Par. p. 85, 3.

[2] See Hallam, vol. iii. p. 195-205.

council were the king's ordinary advisers. Hen. III. in the forty-second year of his reign, promised, that from thenceforward he would do every thing with the assent of his nobles selected to be of his council, and without their assent nothing [1]. The justices of the curia regis were of this council, at least down to the 20th of Edw. I. [2] The oath taken by the members of the council was in substance this—to preserve the rights of the Crown when they could do so according to duty [3], and give council for the universal good of the king and his realm [4].

In the reign of Edward III., the Council of the Star Chamber, or, as it was generally called, the Council, is noticed as distinct from the Chancery [5], both being branches of the select council spoken of above.

In the reign of Richard II., the Chancery, which before that time, perhaps, had been scarcely

[1] Accordingly, from that time we find "omnes comitatus," and "omnia castra," &c. "per totum regnum commiss. per *assensum concilii*." Rot. Pat. 42. H. III. m. 1. m. 6. and m. 7. &c.

[2] Stat. of the R. vol. i. p. 109.

[3] Ibid. p. 248.; temp. 35 Edw. I.

[4] See the oath of privy councillors, Rot. Parl. 11 H. IV. And see 4 Inst. 54.

[5] See 4th Inst. 60. 28 Edw. III. and the stat. 27 Edw. III. against such as appealed to the court of Rome. The Court of Star Chamber, which was abolished in the reign of Charles I. was modelled to its then form by 3 Hen. VII. c. 1. and 21 H. VIII. c. 20.

more than a board or office for the granting of original writs, became a regular court, in which the Chancellor alone presided. The council of the Star Chamber, also, was, about the same time, erected into a court, the Lord Chancellor, Lord President, and other great dignitaries, with such others of the council as the king chose to name, were the members of this court, which was still frequently called simply the Council [1].

It was about the time of this division taking place in the Council, namely, in the reign of Richard II., that the council was separated from the parliament. About the same time also the judges of the king's courts ceased to be members of the council, unless by special appointment, and became, as they now are, assistants and advisers to the great council of the lords in parliament. This great council now exercises the general superintending jurisdiction as to matters arising within the realm, which appears to have been formerly exercised concurrently by the select Council and the Lords [2]. The only superintending jurisdiction which the select or privy council, or rather the king

[1] 4th Inst. p. 60-65. The petition of the Commons, 8th of Hen. V. Rot. Parl. iv. 127. No. xii., shews that at that time the jurisdiction of the council and of the Chancery was quite distinct, and that the Council was the ordinary name of the Star Chamber Court.

[2] See Hallam, vol. iii. p. 215.

in council now exercises is in regard to causes arising in the plantations and elsewhere out of the jurisdiction of this kingdom, and over such matters as the king has cognizance of by especial prerogative, as matters relating to lunatics and idiots [1].

Origin of equitable jurisdiction in England.

The code of equity which is now administered in the Courts of Chancery and Exchequer, had its origin from circumstances very similar to those which gave rise to the prætorian code of the Romans. After a succession of decisions in the courts of King's Bench and Common Pleas, and the acts of the legislature had formed a system of positive law, it was found expedient that there should be some tribunal, in which its severities might be mitigated and its defects supplied. The latter Emperors, as we have seen, claimed the sole right of administering relief against the rigours of the established laws, and supplying their defects [2]. Under Edgar, this prerogative was conferred, by general assent, upon the Anglo-Saxon kings [3]. It was not likely that it should be renounced by the Norman sovereigns. Under the early Norman monarchs, this prerogative appears to have been delegated to the king's select council, and to have been resorted to only on extraordinary

[1] Blackst. Comm. vol. i. p. 231. 3. Peere Williams's Reports, p. 108.

[2] V. *ante*, p. 181.

[3] Wilkins, p. 177.

occasions. In the reign of Richard II., it was committed to the Lord Chancellor to control the administration of the law, by the application of equitable principles, and to administer relief where the law was defective[1]; and the process of subpœna, which was invented in the latter part of the reign of Edward III., was brought into use, to enable him to exercise such jurisdiction. From this time, as before observed, the Chancery became a distinct court.

Introduction of the doctrines of courts of equity as to uses.

The enforcing the performance of trusts, which the ecclesiastical courts had, as before has been mentioned, been prohibited from interfering with, soon became the most important branch of the business of this court after its regular establishment. During the civil commotions which commenced in the reign of Richard II., many persons, who from inclination or necessity took part with one party or the other, with a view to avoid forfeitures of their estates, conveyed them to indifferent persons, for the use of themselves or their relations, a contrivance similar to that which we

[1] The powers given to Lord Chancellor Preston, in the time of Richard II. as expressed in his patent, granted in 1391, extended: "Ad omnia et singula quæ ad expeditionem legum et bonum regimen terræ necessario requiruntur." It is not, however, until about fifty years afterwards, that bills are found addressed to the Chancellor, sitting as a regular judge. Miller on the Present State of the Law, p. 38.

learn from the stat. 15. Rich. II. c. 5. was then frequently resorted to by the clergy, to avoid the statutes of mortmain[1]. Many of the persons to whom such conveyances were made, aware that at law there was no remedy against them for any breach of the trust imposed, sold the estates, and treated them as their own[2]. Constant applications appear to have been made to the king and the council to afford a remedy against such manifest frauds; and the mode adopted was to grant a writ of subpœna, to compel the persons complained of to appear before the Chancellor in his newly erected Court, and abide the order of that court on the subject. In the reigns of Richard II. Henry IV. Henry V. and Henry VI., the Chancellors, by a series of decisions on the cases so brought before them, formed a regular code on the subject of uses and trusts[3].

Final establishment of the jurisdiction of the Chancellor.

From the reign of Edward III.[4] downwards, continual complaints were made by the Commons against the jurisdiction thus assumed by the council and by the Chancery, independent of the courts of common law. In the 17th year of Richard II.[5], the remonstrances of the Commons

[1] 1 Coke's Rep. 121. b. Saunders on Uses, p. 19—21. et v. *ante*, p. 9. and 186.

[2] See the Petition of the Commons, 4th Hen. IV. p. 511.; and Hallam, vol. iii. p. 211.

[3] Bacon on Uses, p. 17, et seq.; Saunders on Uses, p. 26, et seq.

[4] Quarterly Review, No. 63, pp. 93, 106.

[5] See the complaints of the Commons, 3 and 13

were confined to preventing persons being brought into the Chancery on *false* suggestions; so that matters cognizable by the common law might not be drawn into that court. In the 1st of Henry VI., the Commons required that no subpœna should issue to call any one into Chancery without a bill being first filed, stating the grounds of complaint, and a certificate signed by two justices of one bench or the other, purporting that the matters complained of were not remediable by the courts of common law [1]. By the statute of the 15th Henry VI. c. 4, all persons suing out subpœnas in the Chancery were required to give security, to answer all damages and expenses, in case the matter contained in their bills were not made good; the Chancery being still looked upon with great jealousy. This statute, however, and that of 31 Hen. VI. c. 2. established the suppletory jurisdiction of the Chancellor, which indeed had received an indirect sanction by the stat. 17 Rich. II. c. 6. Succeeding Chancellors, particularly from the time of Sir Thomas More,—in the list of whom appear the names of Lord Bacon, Lord Somers, and Lord Hardwicke, keeping in view the principle so often inforced by the Commons, by

Rich. II., in the Rolls of Parliament, as cited by Mr. Hallam, vol. iii. 207, et v. Rot. Parl. 8 Henry VI. 343. Petition against *the council* determining any thing cognizable at the common law.

[1] Rot. Parl. 1 Hen. VI. vol. iv. p. 189: the petition contains other requisitions.

a series of legislatorial decisions, established a system of jurisprudence very similar to, but considerably more extensive than, that which was exercised by the Roman proconsul, sitting in his extraordinary jurisdiction [1]. "It may be said," says Mr. Barrington, alluding to his own times, "that we owe the present beneficial and rational system of equity to the peculiar national felicity of the greatest lawyer and statesman of this or perhaps any other country having presided in this court near twenty years, without a single decree having been reversed, either in the whole or any part of it: an infallibility which in no other instance was ever the lot of humanity." To what extent this system has been improved and perfected under the auspices of the noble person who has now presided in this court upwards of twenty-four years, neither is it yet perhaps the time, nor is the author the person, to pass a judgment.

I must here close this hasty and imperfect sketch. From the whole, perhaps, the reader who has not

[1] The Lord Chancellor, besides exercising a similar remediable jurisdiction to that exercised by the proconsul under his extraordinary jurisdiction (*ante*, p. 182-189), excepting in regard to possession (p. 188), has also, under an authority specially delegated from the crown, the care of lunatics and idiots, and persons incompetent to manage their affairs, from age, disease, and intemperance, (v. *ante*, p. 189).

already turned his attention to the subject, may form some idea of what portion of the laws and institutions of modern Europe, and particularly of England, owe their origin to those of imperial Rome. I shall conclude by observing, that so late as the year 1825, the principle of the *cessio bonorum* of the Romans has been adopted [1] by the English legislature.

[1] *Ante*, p. 177. Stat. 6 Geo. IV. c. 16. § 6 and 7.

APPENDIX.

No. I.

The following is the general form of Money Acts of Parliament, which, since the reign of Hen. IV. at least, have always originated with the Commons. I have taken the Act quite at random, a similar form having prevailed almost from the time when the Commons became an essential branch of the legislature.

5 Geo. I. cap. 9.

An Act for continuing certain duties upon coals and culm, and for establishing certain funds to raise money, as well to proceed in the building of new churches, as also to complete the supply granted to his Majesty, &c.

Most Gracious Sovereign,—Whereas, by an Act of Parliament, made and passed in the 9th year of her late Majesty's reign, entitled, An Act for granting to her Majesty several duties upon coals, for building fifty new churches in and about the cities of London and Westminster, and suburbs thereof, and other purposes therein mentioned, it was enacted, &c. [Then follow recitals of other Acts of Parliament. The Act then proceeds thus:] Therefore we, your Majesty's most dutiful and loyal subjects, the Commons of Great Britain in Parliament assembled, being desirous to pursue your Majesty's pious and gracious intentions for the honour and benefit of the Church of England, and advancement of our holy re-

ligion, by making provision for raising the said sum of three hundred and sixty thousand pounds, in such proportions at a time as shall be needed, to be employed (so far as the same will extend) for or towards the building and finishing of churches, purchasing sites, &c.; and being also desirous to make good the supply granted to your Majesty in this Session of Parliament, &c. do *most humbly present to your Majesty* the several impositions, rates, and duties herein after mentioned, and do most humbly *pray*, That it may be *, and *be it* enacted *by* THE KING'S MOST EXCELLENT MAJESTY, by and with the *advice* and *consent* of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by *the authority* of the same, That, &c. [Then follow the enactments.]

This form has evidently been adopted with a view to reconcile the pretensions of the king and the commons, *vide* p. 546—8. The king still *enacts*, but it is by the advice and *authority* of the lords and commons.

No. II.

In the Pamphlet alluded to, in page 192 of this Essay, Mr. Swinton states his object to be, to attempt to prove, that the Form of Process before the Court of Session, if duly adhered to, and followed out, as prescribed by the orders of Court, is admirably well adapted for the attainment of the ends of justice, in a plain, simple, and expeditious manner; affording

* The royal assent to the *Petition* or *Bill* on which the act is founded, is given in these words: "Le roy remercie ses loyaux subjects, accepte lour benevolence et aussi *le veut*." To all public Bills, excepting money bills, the royal assent is given in this form—"le roy *le veut*."

an equal opportunity for discussion to the Party, and deliberation to the Judge; and that the opposite opinion, whatever respect may be due to those who hold it, arises very much from prejudice or imperfect information. "For the information," he proceeds, "of those who are strangers to our Form of Process, I shall here give a general account of it in its principal outlines.

"I would observe then, that the Court of Session is the only Supreme Tribunal with us *in civilibus*, and that it is competent to give redress for all private wrongs of whatever nature." We have not the distinction which I believe is so well known in England, betwixt wrongs for which redress lies by an *action at law*, and those for which redress must be sought by a *bill in equity*. With us an *ordinary action* is competent before the Court of Session on every ground of complaint which one man can have against another; and it is instituted by an original writ, called a SUMMONS, which is prepared and signed by a writer to the Signet, and passes his Majesty's Signet. The Summons consists of three parts—the LIBEL, the CONCLUSION or DECERNITURE, and the CITATION, or WILL as it is more generally termed. The LIBEL sets forth the grounds or circumstances on which the Pursuer lays his action; as for instance, for payment of an alleged debt, for fulfilment or performance of an alleged obligation, or for redress of an alleged injury. The CONCLUSION states the terms on which the Pursuer desires the Court to pronounce Decree or Judgment in his favour. The CITATION or WILL is merely a warrant for summoning the Defender to appear before the Court against a certain day, to hear sentence pronounced against him in terms of the Libel, or else to allege a reasonable cause to the contrary. The Defender being served with a copy of the Summons, enters an appearance, and being allowed to *see* the summons and writs founded on, puts in written DEFENCES, in answer to the

Court of Session.

The summons.

Libel.

Decerniture.

Citation.

Pursuer's demand. These Defences contain merely a statement of the facts and of the pleas of Law which are to be founded upon, without any argument or observation; they must be signed, and ought to be prepared, by the Counsel for the Defender. The defender is also required, along with his Defences, to produce all Documents which he is to found upon in their support. The Pursuer being allowed an opportunity of seeing the Defences and relative Documents, it then becomes competent for him to proceed, and have his Action debated. The Debate or hearing takes place, not before the whole Court, but before one of the Judges, who is appointed for the special purpose of deciding all Causes in the first instance. He is termed the *Lord Ordinary*, and sits in what is called the *Outer House*, to distinguish it from the *Inner House*, where the DIVISIONS sit and form a Court of Review on the Judgments pronounced by their respective Lord Ordinaries. This duty of being Lord Ordinary was formerly performed by all the Judges in rotation, except the Lord President, and it lasted for a week at a time. Causes, however, when once heard by the Lord Ordinary of the week, (though only in part,) continued before him until he gave a judgment disposing finally of them; and he was allowed certain opportunities of going to the Outer House to hear them when necessary in their farther progress before him.† Since the late institution, however, of Permanent Outer-House Judges, the whole Outer-House duty is done by the *five* junior Lords. Two of each Division act as Lord Ordinaries, and these four take the Chair of the Outer House weekly, by turns; while the fifth or junior Judge, who is attached alike to both Divisions, has a particular duty to perform, which is exclusively appropriated to him; and his decisions are subject to the Review of either of the Divisions, according as the Cause has been sent to him from one or other of them.

Hearing before Lord Ordinary.

"At the Hearing in the Outer House, the Lord Ordinary may pronounce either a Definitive or an Interlocutory Judgment, according as the nature of the Case may admit; or, if it involve a question of difficulty, he may appoint the Parties to put in mutual argumentative Pleadings in writing, termed MEMORIALS. When Parties are at variance on the truth of the facts alleged on either side, and a Proof by parole testimony becomes necessary, the Lord Ordinary either judges of the Relevancy of the Libel, and allows a Proof, after advising special Pleadings put in for that purpose, and termed a CONDESCENDENCE and ANSWERS; (wherein on the one hand the Pursuer ought to set forth, without observation or argument, the facts which he avers and offers to prove in support of his Libel; and, on the other hand, the defender ought in like manner to admit or deny the Pursuer's averment, and make counter averments, if he any has;) Or, without determining the relevancy in *illo statu*, his Lordship may allow a Proof *before Answer*, as it is termed. The Proof is not taken in presence of the Lord Ordinary, but in presence of a Commissioner named by his Lordship; and this Commissioner examines the Witnesses, commits their Depositions to writing, and then reports the whole, either to the Lord Ordinary or the Court, according as his Lordship's Interlocutor allowing the Proof has been expressed. Whatever judgment the Lord Ordinary pronounces, either at the Hearing,—or on advising Memorials,—or at any after stage of the proceedings, it is competent for the losing Party to submit it to his Review within a certain period, by an argumentative Pleading in writing, termed a REPRESENTATION. It is prepared and signed by Counsel, and enters fully into the merits of the case, and of the Interlocutor represented against, of which it prays a recall or alteration. This Representation, with the process, being transmitted to the Judge, his Lordship either refuses, or appoints it to be

Written pleadings, termed memorials.

Condescendence and answers.

Proof.

Pleading called a representation.

Pleading, called answers.

answered. The ANSWERS are an argumentative pleading on the opposite side, also prepared and signed by Counsel. When the Answers are put in, the Process is again transmitted to the Lord Ordinary; and his Lordship, on advising the Representation and Answers, with any other Procedure which he may have thought it necessary to appoint in order to sift the Case and prepare it for decision, pronounces an Interlocutor, either adhering to or altering his former Judgment. If he adheres, a second Representation is competent, which may or may not be appointed to be answered. And if on advising the second Representation, his Lordship again adheres, the cause becomes final in the Outer-House; in which case the party dissatisfied must apply to the Inner House, that is, to the Division to which the Ordinary is attached *. On the other hand, should the Lord Ordinary alter his original Judgment, upon advising a first or second Representation, two Representations are competent against that Interlocutor, in so far as it alters the former. When the Proceedings are concluded in the Outer House, in the manner which has been mentioned, the Cause may be brought under Review of the Division by presenting a RECLAIMING PETITION, which is printed and distributed among the Judges. The Petition, after having been considered by the Judges at home, is moved in Court and deliberated upon. It is either appointed to be answered, or

Interlocutor.

Reclaiming petition.

* "It is not necessary that, in both these Representations, the merits of the case should be fully discussed; the Party may make one of them a mere recital of the Interlocutor complained of, and pray a recall of it. If this is done, it is refused, of course, without Answers, and has merely the effect of preventing the Interlocutor from becoming final till the expiration of a new course of reclaiming days. This, it may be noticed, is the mode generally adopted in practice; and I may add, that if the case is fully stated in a first Representation, it is not indispensable to present a second; but a second Representation may be presented to the Lord Ordinary, if the Party sees cause."

simpliciter refused. When the Answers are put in, the case is enrolled for advising by the Inner House. The Petition and Answers having been considered by the Judges at home, are decided upon in open Court. But the Judgment of the Inner House, though affirming the Interlocutor of the Ordinary, may be submitted to the review of the Court by a second Reclaiming Petition, which is disposed of in the same way as the first; and if, on advising this second Reclaiming Petition and Answers, their Lordships shall adhere to their first Judgment, the Cause is then final in this Court. It is, however, to be remarked, that the two Judgments, either of the Lord Ordinary, or of the Division, must be in favour of the same party, and in the same terms; for should any alteration be made in the Judgment, either of the Lord Ordinary or of the Division, it is competent for the losing party *twice* to represent or reclaim. So to render any Judgment final, *two* consecutive Interlocutors, in the same terms are required.

Second reclaiming petition.

"From what I have now stated, it will be seen, that the most laborious part of the Duties of a Judge, whether of the Outer or the Inner House, is performed by him in his closet at home. In fact, he does a great deal more there than he does in open Court. The Outer-House Judge has to study and advise the written Pleadings, such as Representations, Answers, or Memorials, in the progress of perhaps *three hundred* separate Actions, brought before him in the course of the year; and the Inner-House Judges have to read the Reclaiming Petitions and Answers, Memorials, Informations, and other printed Pleadings, to the amount, in the course of the year, of many thousand pages *.

* "These were shown by a statement exhibited in Lord Swinton's Suggestions, to amount, in the course of the Winter and Summer Sessions, to 24,930 quarto pages; and though the Court now sits in two Chambers,

"I ought, perhaps, to have noticed too, that it is competent to the Lord Ordinary to send the Cause at once to the Judges of the Inner House for their Decision, by appointing the Parties to put in printed Pleadings, termed INFORMATIONS, and then reporting it to their Lordships on his own statement! —and, further, that it is at all times competent to a Lord Ordinary, or to the Division, to order any point in a Cause that may seem to require it, to be argued by Counsel *viva voce* in his or their presence.

Informations.

"Such (Mr. Swinton proceeds) is the course of proceeding in the prosecution of an *Ordinary Action* before the Lord Ordinary and the Division; and, from the above statement, general as it has been, I have no doubt but it will be apparent that the character which has been given of our Form of Process is a most just and correct one; indeed I think it would be difficult to contrive one better calculated, on the whole, for the attainment of the great ends of justice in the most effectual and expeditious manner, consistently with due discussion and consideration. The Parties, on the one hand, have the fullest opportunity to state their Case to the Judge; first, by a *viva voce* Pleading, and again in writing; and the Judge, on the other, has the fullest opportunity to deliberate on the Pleadings of the Parties, oral and written, and pronounce his Judgment after due consideration. Let any one who doubts of the full Justice which is thus done to a Cause, or who supposes that this Form of Process could be materially changed with advantage, only take the trouble to look into a Process which has been advised on a Representation and Answers, and he will be well satisfied, from the terms of the Judgment, and from the Notes which in many cases the Lord Ordinary has taken the trouble of preparing, for the purpose of expla-

which divides the business betwixt them, yet the printed Pleadings are now so much increased in length and multiplicity, that I apprehend each Division has to read as much as the whole Court had in the time of that Judge.

nation in case of a Reclaiming Petition to the Division, that no material alteration could be devised which, in all probability, would not, on the whole, do more harm than good. A Lord Ordinary, doubtless, may commit error,—he may misapprehend the facts of the case, or may mistake or misapply the law; but then observe what an admirable mode of redress is afforded by an Appeal to the Inner-House on a Reclaiming Petition. The losing Party before the Lord Ordinary, has full opportunity to restate his case to the Division, and their Lordships have full opportunity to make themselves masters of it, by studying the printed Pleadings at their leisure at home, and then delivering their opinions in Court."

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